APPENDIX A.

Opinion of the Court.

(Filed March 30, 1967)

By HASTIE, *Circuit Judge.*

The plaintiff's decedent, a resident of Pennsylvania, returning home on a commercial Eastern Airlines plane, was killed when the plane crashed into the navigable waters of Boston Harbor just after taking off from Boston's Logan Airport on a flight to Atlanta, Georgia, with the first scheduled stop at Philadelphia. Alleging that the fatal accident was caused by negligence and contractual breach of warranty [1] on the part of Eastern, the decedent's administrator sought redress in the United States District Court for the Eastern District of Pennsylvania. Diversity of citizenship was alleged and the action was brought and heard on the "law side" of the district court.

The Massachusetts statutes concerning liability for wrongful death and the survival of causes of action, as in effect at the time of the accident, made one whose negligence has caused the death of another liable "in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability" and also permit recovery of certain expenses incurred as a result of the wrong. Mass. Gen. Laws ch. 228, § 1(2) and ch. 229, § 2. In contrast, the Pennsylvania Wrongful Death and Survival Acts would authorize recovery of the present worth of the anticipated

1. On this appeal an agreed "Statement of the Case" asserts that only the claim predicated upon negligence was submitted to the jury and that "the breach of warranty theory was specifically waived by the plaintiff".

value of the decedent's estate as it would exist at the end of a normal lifetime. 12 P. S. §§ 1601-04, 20 P. S. § 320.601.

The case was tried in two stages. First, a jury considered the question of liability and found for the plaintiff, thus deciding that the negligence of the defendant was a responsible cause of the fatal accident. Thereafter, the question of damages was litigated. The court refused the defendant's request for an instruction to the effect that the nature and extent of the right of recovery should be determined in accordance with the restrictive provisions of Massachusetts law. Instead, the jury was permitted to award full compensation for loss as provided under the Pennsylvania Wrongful Death and Survival Acts. This appeal challenges the correctness of that ruling.

We consider first the significance of the fact that the wrong, the hurtful impact of the plaintiff's negligence on the decedent, occurred in or over the navigable waters of Boston Harbor.

In *Weinstein v. Eastern Airlines, Inc.*, 1963, 316 F. 2d 758, 759, *cert. denied*, 375 U. S. 970, a libel arising out of this very accident, we ruled that "an action for wrongful death arising out of the crash of an aircraft in navigable waters within one marine league from shore lies within the admiralty jurisdiction of the United States". Unquestionably, this is a maritime tort within admiralty jurisdiction. However, it is argued by the appellee that because the present complaint has been framed as an action at law under diversity jurisdiction, the existence of admiralty jurisdiction is of no presently controlling consequence. More particularly, it is urged that under *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 1941, 313 U. S. 487, the district court sitting in Pennsylvania properly applied Pennsylvania conflict of laws rules to reach the conclusion that the Wrongful Death and Survival Acts of Pennsylvania

provide the measure of the plaintiff's right to recover damages.

We are not persuaded by this argument. The established rule is that the principles of admiralty law define liability for a maritime tort, whether the proceeding is instituted in admiralty or on the law side of the court. *The Tungus v. Skovgaard,* 1959, 358 U. S. 588; *Pope & Talbot, Inc. v. Hawn,* 1953, 346 U. S. 406; *Massaro v. United States Lines,* 3d Cir., 1962, 307 F. 2d 299; *J. B. Effenson v. Three Boys Corp.,* 5th Cir., 1956, 238 F. 2d 611. Thus, the circumstance that the tort occurred on navigable water, fortuitous though it was, placed the present controversy within an area regulated by federal rather than state law. This is not changed by the circumstance that the parties are domiciled in different states or that this diversity made it permissible to litigate the matter on the law side of the court.

Once the dominance of federal law is recognized, it becomes apparent that the rule and policy of *Erie R. Co. v. Tompkins,* 1938, 304 U. S. 64 and *Klaxon v. Stentor Electric Mfg. Co., Inc., supra,* are inapplicable. In those cases diversity entitled the litigants to a federal forum but did not cause federal substantive law to rule the issues in controversy. Here, the maritime character of the tort brings the controversy under the governance of federal law and it is immaterial whether admiralty or diversity jurisdiction is relied upon as justification for suing in the federal forum. Obviously, a court thus undertaking to apply federal substantive law would have no occasion to defer to or apply state choice of law rules.

We apply this analysis to the solution of the particular problem of this case. Under maritime law negligence causing harm on navigable water is actionable. But historic rules of admiralty law did not recognize such a cause as surviving after the injured person died. Neither did they

provide dependents with a right to recover for the loss of the decedent's support. Congress has seen fit to provide a legislative remedy for this deficiency only where death occurs on the high seas. 41 STAT. 537, 46 U. S. C. § 761. Therefore, the federal courts have had to determine whether, when and how maritime law should be shaped to accommodate the claims of dependents and other survivors of deceased victims of maritime torts which occur within the territorial waters of a state rather than on the high seas. This undertaking has resulted in the adoption and consistent application of a novel but simple rule of borrowing. The maritime law will accord dependents and survivors rights of recovery neither more nor less extensive than they would enjoy under the law of the state within whose territorial waters the fatal maritime tort occurred.[2] *Hess v. United States,* 1960, 361 U. S. 314; *The Tungus v. Skovgaard,* 1959, 358 U. S. 588; *Western Fuel Co. v. Garcia,* 1921, 257 U. S. 233; *The H. S. Inc.,* 3d Cir., 1942, 130 F. 2d 341.

Of course some other expedient might have been adopted. Borrowing could have been made from the law of the decedent's domicile or the law of the state whose contacts with the parties, their dealings and the mishap were deemed most significant. But, over the years, the Supreme Court and the inferior courts under its guidance have adhered to the simple rule of borrowing in their entirety the wrongful death and survival rules of the state within whose boundaries the maritime tort occurred.[3]

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2. This rule may be subject to the limitation that "a state wrongful death act might contain provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them". *Hess v. United States,* 1960, 361 U. S. 314, 320.

3. Reflection over a ten year period has persuaded the writer of this opinion that this analysis, rather than the contrasting view expressed in his dissenting opinion in *Skovgaard v. The Tungus,* 1957, 252 F. 2d 14, 19-20, is sound.

The court below has seen fit to abandon this rule and to substitute another. In our view this was error. Maritime law is national law and its principles should, to the best of judicial ability, be recognized and applied uniformly. While an inferior court is always obligated to conform its judgments to the law as found or declared by the Supreme Court, the national character of maritime law underscores the need for such conformity in this area. If the long and consistently accepted and applied rule of maritime law which requires that the federal right of recovery in such cases as this be measured by the provisions of Massachusetts law is to be modified, that change should be made by the Supreme Court.

The judgment will be reversed and the cause remanded for a new trial on the issue of damages.

APPENDIX B.

Opinion on Rehearing.

(Filed June 28, 1968)

By STALEY, *Circuit Judge.*

This appeal arises out of wrongful death and survival actions brought by plaintiff-appellee, Donald A. Scott, Administrator of the Estate of Thomas L. Moody, deceased, against defendant-appellant, Eastern Air Lines, Inc. Plaintiff's decedent, a Pennsylvania resident, was killed while returning home aboard a Lockheed Electra aircraft operated by Eastern. The plane crashed into the navigable waters of Boston Harbor shortly after taking off from Boston's Logan Airport on a flight to Atlanta, Georgia, with the first scheduled stop at Philadelphia. Basing jurisdiction on diversity of citizenship, the decedent's administrator brought suit on the "law side" of the United States District Court for the Eastern District of Pennsylvania, alleging that the decedent's fatal injuries were the result of "negligence, breach of warranties, and breach of contract" on the part of Eastern.[1]

The following facts are undisputed. Mr. Moody resided in an apartment in Philadelphia from June 1, 1955, until his death. During this period, he was employed by Sears Roebuck & Co. as a territory field man with an office in the Sears' Administration Building in Philadelphia. His ill-fated trip to Massachusetts was taken in furtherance of his employer's business; it concerned the opening of a new store in Sagus, Massachusetts. The ticket on which the decedent was travelling at the time of his death was issued

1. Plaintiff abandoned his breach of warranty theory before the case came to trial.

in Philadelphia by Northeast Airlines for a trip from Philadelphia to Boston on October 3, 1960, on Northeast Airlines, and for a return trip from Boston to Philadelphia on October 4, 1960, on the Eastern aircraft.

Eastern is incorporated under the laws of the State of Delaware and does business in various states, including Pennsylvania. Its principal place of business is neither in Pennsylvania nor in Massachusetts.

At the time of his death, decedent was unmarried and childless. He was, however, survived by a brother, Robert, of Los Angeles, California, who was named as sole beneficiary in decedent's will. The necessary letters of administration were granted by the Register of Wills of Philadelphia County, and an inventory of the estate disclosed that decedent owned personal property situated in Pennsylvania but no real property anywhere. He did, though, at the time of death, have a lease on his apartment in Philadelphia. The debts of the estate, all owing to Pennsylvania creditors, were approximately $1,000. The estate was solvent and paid out over $1,000 in Pennsylvania inheritance taxes. However, the estate did resist a claim by the Commonwealth of Pennsylvania for $4,773.03 in inheritance taxes on decedent's interest in the Sears Roebuck saving and profit sharing pension fund passing out of his estate to beneficiaries residing in North Carolina who had been designated by decedent in accordance with the rules of the plan.

The district court tried the case in two stages. First, evidence was heard on the sole issue of liability, with the jury returning a verdict in favor of the plaintiff and against Eastern. This, of course, meant that the negligence of the airline was a proximate cause of Moody's death. Next, after refusing Eastern's request for an instruction to the effect that damages could only be awarded in accordance

with the laws of Massachusetts, the district court instructed the jury to award damages in compliance with the laws of Pennsylvania. This they did, rendering a verdict of $2,500 under the Pennsylvania Wrongful Death Act, 12 Purdon's Pa. Stat. Ann. § 1601 et seq., and $45,000 under the Survival Act, 20 Purdon's Pa. Stat. Ann. § 320.601. We are here concerned with the propriety of applying Pennsylvania law to the issue of damages rather than the law of the place of injury, Massachusetts.

The question presented to this court is one of some importance. Not only will our decision directly affect the instant litigants, but it may also have an important bearing on the outcome of many other suits arising out of the Eastern Air Lines crash. We have carefully considered the opposing arguments and theories presented at oral argument and in the respective briefs, and have concluded that the ruling of the district court should be affirmed.

I.

The Massachusetts statutes concerning liability for wrongful death and the survival of causes of action, as in effect at the time of the accident, made one whose negligence has caused the death of another liable "in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability" and also permit recovery of certain expenses incurred as a result of the wrong. Mass. Gen. Laws ch. 228, § 1(2) and ch. 229, § 2. The Massachusetts law is obviously restrictive and penal in nature as it provides for liability, within the specified limits, commensurate with the "degree of culpability." Pennsylvania's Wrongful Death and Survival Acts, on the other hand, are compensatory in nature. As applied to this case, recovery under the Survival Act would include the

amount of lost past earnings from the date of death to the date of trial less what the decedent would have probably spent on his own maintenance, plus the amount of future earnings, reduced to present worth, from the date of trial less the probable cost of decedent's maintenance during the time he would have lived. Recovery for the wrongful death would encompass funeral expenses and expenses of administration necessitated by reason of the injuries causing death.

With respect to the survival action, it is our view that plaintiff has presented a valid diversity claim under the laws of Pennsylvania. As already noted, the complaint alleged that the decedent's fatal injuries were the result of Eastern's "negligence, breach of warranties, and breach of contract." During the pre-trial proceedings, plaintiff specifically waived his breach of warranty theory, but there is no evidence that there was any waiver of the contract claim. Such a claim is cognizable in assumpsit under Pennsylvania law as a cause of action for breach of contract of nonnegligent carriage. Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A. 2d 796 (1964).

Eastern, however, argues that under the agreed "statement of the case," which largely constitutes the record on this appeal, there is no basis for finding a contractual obligation between Eastern and the decedent. With this we cannot agree. In *Griffith*, the Pennsylvania Supreme Court held that in adjudicating a claim based on breach of contract of nonnegligent carriage "* * * [t]he principles which will govern defendant's liability are principles of negligence, not of contract, since the action is for negligent breach, not simple breach, of contract." 416 Pa. at 11, 203 A. 2d at 800. A reading of the agreed "statement of the case" discloses that plaintiff alleged in his complaint that decedent's death was caused, among other things, by

Eastern's negligence, and at the trial of the cause, he relied upon the issues of Eastern's negligence with respect to: (1) the design and operation of the airplane; (2) the use of this airplane at Logan Airport in view of the known field conditions; and (3) in permitting the airplane to operate with a defective co-pilot's seat. Since the jury found in favor of plaintiff and against Eastern, this finding perforce had to be predicated on the existence of negligence.

The fact that plaintiff did not introduce into evidence a document entitled "contract of carriage" is not fatal to his claim, for the common carrier's contractual obligation to transport its passengers in a nonnegligent manner is not bargained for by the respective parties; rather it is imposed by law. As reiterated in Dougherty v. Maine Central Trans. Co., 141 Me. 124, 129, 39 A. 2d 758, 759 (1944),

> "'The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business *impliedly promises* that his passenger shall have this degree of care. * * * The passenger's remedy may be either in assumpsit or tort, at his election.'" (Emphasis added.)

Although the Pennsylvania Supreme Court in *Griffith* did not explicitly refer to the derivation of the carrier's obligation, in holding that Pennsylvania will recognize a claim based on breach of contract of nonnegligent carriage, the court did say,

> "We cannot perceive, nor has there been brought, to our attention, any compelling reason for Pennsylvania to restrict an injured passenger to an action in trespass while, at the same time, a shipper may elect between trespass and assumpsit for damage to goods. * * *" 416 Pa. at 10, 203 A. 2d at 800.

Robinson Electrical Co. v. Capitol Trucking Corp., 168 Pa. Super. 430, 79 A. 2d 123 (1951), is the Pennsylvania decision which held that a shipper of goods could elect between trespass and assumpsit. In that case, the court said:

> "The liability of a common carrier for goods entrusted to it for transportation does not arise from contract, but *is cast upon the carrier by the law.* * * * An action either ex delicto or ex contractu will lie for breach of the carrier's duty. * * *" 168 Pa. Super. at 433, 79 A. 2d at 125. (Emphasis added.)

Since it is clear that a shipper of goods impliedly promises that the goods will be transported in a nonnegligent manner, the conclusion is inescapable that an airline also impliedly promises that its passengers will be carried in a nonnegligent fashion. No amount of sophisticated argumentation can convince us that Pennsylvania imposes a higher duty of care with regard to the shipment of goods than it does with respect to the carriage of passengers. Indeed, such a value priority would be unthinkable in this day and age. In light of the foregoing discussion, therefore, we think that plaintiff, under the facts of this case, did all that was required of him to establish his state-related claim of breach of contract of nonnegligent carriage. He alleged the breach of contract, he introduced into evidence the airplane ticket purchased by decedent in Philadelphia, and he proved that the negligent breach of Eastern's implied promise constituted a proximate cause of decedent's death. Nothing else need have been done.

Now the argument has been advanced that the Pennsylvania Supreme Court in the *Griffith* case seemed to adopt the old common law procedural device of waiving the tort and permitting recovery in assumpsit in order to enable Pennsylvania law to control recovery sought by a paying

passenger for negligent injury suffered at the hand of a common carrier. It is contended under this argument that Erie R. R. v. Tompkins, 304 U. S. 64 (1938), did not go so far as to require a federal court seeking to redress a maritime tort to accept Pennsylvania's invocation of an ancient device of common law pleading to accomplish a fictitious transmutation of a suit on a maritime tort into a suit on civil contract with resultant abdication of federal authority over maritime mishaps. This theory, though adroitly phrased and vigorously asserted, is not a perplexing one as we think this court decisively settled the issue in Weinstein v. Eastern Airlines, Inc., 316 F. 2d 758 (C. A. 3), cert. denied, 375 U. S. 940 (1963). In that case, plaintiffs, alleging maritime jurisdiction, sought redress in the federal district court on claims involving tort, breach of contract, and breach of warranty. The district court dismissed the actions as being not within the maritime jurisdiction. On appeal, this court, speaking through Chief Judge Biggs, held that although the tort claims under consideration fell within admiralty jurisdiction,

> "* * * a contract or warranty relating to the airframe or power plant of a land-based aircraft and *a contract of carriage by air* between two cities on the United States mainland are *not maritime in substance*, nor are such contracts and warranties made maritime by virtue of the fact that the aircraft in question flew briefly over navigable waters en route from Boston to Philadelphia." 316 F. 2d at 766. (Emphasis added.)

Proper judicial administration commands that once the expectation is established that a particular claim is state-created and not maritime in nature, that expectation will not be dashed except for the most compelling of reasons. And since we think that *Weinstein* accurately distinguished

between tort claims that are maritime in nature and contract claims that are not, we hold that recognition of the diversity claim for breach of contract of nonnegligent carriage can in no sense be construed as an abdication of federal authority over maritime torts.

As the contractual claim against Eastern is rooted in Pennsylvania law, it is governed directly by the teaching of Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487 (1941), which directs district courts to look to the choice of law rule of the state in which it sits. Pennsylvania's rule was articulated in the now familiar case of Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A. 2d 796 (1964). In *Griffith*, the plaintiff's decedent purchased a ticket from United in Philadelphia for a flight from Philadelphia to Phoenix, Arizona, and return. On the way to Phoenix, the decedent met immediate death when the plane crashed in the course of landing at Denver, Colorado, a scheduled stop. The issue before the court in *Griffith* was whether Pennsylvania or Colorado law should govern the amount of recoverable damages. In reasoning toward the ultimate conclusion that Pennsylvania law controlled, the court stated:

> "* * * the strict lex loci delecti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court. * * *"
> 416 Pa. at 21, 203 A. 2d at 805.

The court wisely avoided the pitfall of substituting one rigid rule for another, but did go on to rely upon a balance of the following factors: the interests of the place of the injury; the interests of the place where the relationship was created; the domicile of decedent and his family; the place of the administration of the decedent's estate; and the domicile of the decedent's surviving dependents.

Aside from the obvious factual similarity between *Griffith* and the instant case, it becomes apparent when we apply Pennsylvania's interest and policy analysis to the facts of this case, Pennsylvania "has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law." See McSwain v. McSwain, 420 Pa. 86, 94, 215 A. 2d 677, 682 (1966). The only arguable factor pointing to the application of Massachusetts law is that Massachusetts was the place of injury. Under Pennsylvania law, however, this factor in itself does not necessarily create a legal interest in favor of the application of Massachusetts law. For example, in Kuchinic v. McCrory, 422 Pa. 620, 222 A. 2d 897 (1966), a case concerning actions for the death of Pennsylvania domiciliaries killed in an airplane crash in Georgia, the court, in holding that Pennsylvania law applied, stated that "under no stretch of the imagination can Georgia be viewed as a concerned jurisdiction," 422 Pa. at 624, 222 A. 2d at 899, and implied that the *Griffith* case, like *Kuchinic,* exemplified a "false conflict" where the place of injury had only "nominal contacts with the transaction." 422 Pa. at 624 n. 4, 222 A. 2d at 889 n. 4.

When the facts of this case are juxtaposed with those of *Griffith* and *Kuchinic,* it becomes evident that the conflict here is just as "false" as it was there. Appellant's argument that Massachusetts has a substantial interest in view of the underlying policy of its Wrongful Death Act to deter potential tortfeasors from engaging in tortious conduct in Massachusetts is unpersuasive. If deterrence is, as it seems to be, the underlying policy of the Massachusetts act, see Hudson v. Lynn & B. R. R., 185 Mass. 510, 71 N. E. 66 (1904), there can be no impingement upon this policy by exposing appellant to Pennsylvania's more liberal, compensatory measure of damages. Indeed, liability for compensa-

tory damages is in itself a deterrent against tortious conduct, and appellant cannot reasonably contend that it and other airlines will be less careful in regulating their conduct because the Pennsylvania measure of damages, rather than that of Massachusetts, has been held to apply to the instant and similar transactions.

Equally unpersuasive is appellant's argument that constitutional limitations would preclude Pennsylvania courts from applying Pennsylvania law to this case. In Richards v. United States, 369 U. S. 1 (1962), involving actions for deaths in an airplane crash in Missouri allegedly caused by negligent acts occurring in Oklahoma, the Supreme Court of the United States held:

> "* * * Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity. * * *" 369 U. S. at 15.

Without elaborate discussion, we think it sufficient to say that the facts before us reveal that Pennsylvania has "sufficiently substantial contact with the activity in question," and under the rule of International Shoe Co. v. Washington, 326 U. S. 310 (1945), as applied in McGee v. International Life Ins. Co., 355 U. S. 220 (1957), we hold that application of Pennsylvania law violated neither the Due Process nor the Full Faith and Credit clauses of the United States Constitution.

II.

Although the issue was not extensively discussed by any of the parties in their briefs, we think that plaintiff

also presented and proved a valid diversity claim under the Pennsylvania Wrongful Death Act. 12 Purdon's Pa. Stat. Ann. § 1601 et seq. The Act provides in part:

> "*Whenever death shall be occasioned by* unlawful violence or *negligence,* * * * the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned." 12 Purdon's Pa. Stat. Ann. § 1601. (Emphasis added.)

The statute makes it quite clear that proof of unlawful violence or *negligence* is necessary if one is to recover under its provisions. Similarly, in Griffith v. United Air Lines, Inc., supra, the Pennsylvania Supreme Court made it just as clear that a finding of negligence is essential for recovery under the Survival Act when proceeding on the theory of breach of contract of nonnegligent carriage. As earlier observed, the court explicitly stated that "[t]he principles which will govern defendant's liability are principles of negligence, not of contract, since the action is for negligent breach, not simple breach, of contract." 416 Pa. at 11, 203 A. 2d at 800. Thus, the only logical conclusion that we can draw is that the negligent breach sufficient to satisfy the Survival Act is also sufficient to satisfy the Wrongful Death Act. Appellant, however, argues that such is not the law of Pennsylvania. But since appellant cited no cases in the short space devoted to this contention,[2] we cannot be absolutely sure as to what authority it relies on.

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2. Eastern's basic contention is as follows:

"* * * Any rights to recover for wrongful death are rights created purely by statute for the benefit of designated beneficiaries. Any rights of statutory beneficiaries arise from statute and not from any contractual relationship with appellant or from any notion that they were by intention of the parties the third-party beneficiaries of any contractual provisions."

Our own research, however, leads us to believe that the argument is bottomed upon two relatively recent Pennsylvania cases concerning assumpsit actions for wrongful death allegedly caused by breach of various warranties. Miller v. Preitz, 422 Pa. 383, 221 A. 2d 320 (1966); DiBelardina v. Lemmon Pharmacal Co., 416 Pa. 580, 208 A. 2d 283 (1965). The issue in *Lemmon Pharmacal,* supra, was whether an action for wrongful death could be brought in assumpsit based upon an alleged breach of an implied warranty of fitness for use. In holding that the action was impermissible in Pennsylvania, the court stated:

> "* * * In our view, the legislature intended to create a right of action where death has resulted from a tortious act and that damages arising therefrom are recoverable *only* in an action in trespass." 416 Pa. at 585, 208 A. 2d at 285-86. (Emphasis theirs.)

In Miller v. Preitz, supra, decedent's administrator brought actions in assumpsit under the Wrongful Death and Survival statutes for damages allegedly resulting from breaches of implied warranties of merchantability. Addressing itself to the administrator's election to frame the wrongful death action in assumpsit, the Pennsylvania Supreme Court ruled:

> "On the basis of our decision in DiBelardino v. Lemmon Pharmacal Co., 416 Pa. 580, 208 A. 2d 283 (1965), the lower court properly sustained preliminary objections to plaintiff's 'Wrongful Death' count. In *Lemmon Pharmacal* we held that the right of action provided by the 'Wrongful Death' statute could be brought only in trespass and that, therefore, an action in assumpsit for breach of warranty was inappropriate. * * *" 422 Pa. at 386-87, 221 A. 2d at 322.

We assume that appellant would rely heavily on the above-quoted passages to support the position that a contractual claim of any nature could not possibly invoke the remedies afforded by the Pennsylvania Wrongful Death Act. It is our opinion, however, that the Pennsylvania courts would not view the issue in such a constricted, myopic manner, for to do so would, in effect, amount to a repudiation of the progressive policies espoused in *Griffith* and a reversion to the now discredited practice of raising form above substance. Such an approach was eschewed by the court in *Griffith* when it said:

> "* * * The essentials of this case [negligent breach of contract] remain the same regardless of its label. Mere technicalities of pleading should not blind us to the true nature of the action. The choice of law will be the same whether the action is labeled trespass or assumpsit." 416 Pa. at 11, 203 A. 2d at 800.

Using this latter frame of reference, it becomes apparent that "the essentials of this case" are similar to those of *Griffith* but are obviously distinguishable from those of *Lemmon Pharmacal* and *Preitz*. Both *Lemmon Pharmacal* and *Preitz* involved wrongful death claims for breach of warranty; in neither case was negligence alleged nor proved. In both cases, the court referred to the wording of the Pennsylvania Wrongful Death Act and concluded that recovery under its provisions could only be permitted upon a showing of unlawful violence or negligence. Negligence, or course, is the essence of the present claim, just as it was in *Griffith*. The instant plaintiff not only alleged but proved negligent breach of contract. By so doing he established his diversity right to recover under the Pennsylvania Wrongful Death Act.

III.

It is our opinion, separate and independent of our views on the contractual diversity claims, that the district court's choice of Pennsylvania law should also be affirmed on the basis of the applicability of Federal maritime principles to "the tort claims *sub judice.*" Weinstein v. Eastern Air Lines, Inc., 316 F. 2d 758, 766 (C. A. 3), cert. denied, 375 U. S. 940 (1963). In *Weinstein,* it was clearly held that if fatal injuries are sustained upon navigable waters, tort claims for those injuries are maritime in nature. And although this suit was brought as an action at law, maritime principles will govern the tort aspects of the case, since admiralty standards define liability for a maritime tort, whether the proceeding is instituted in admiralty or on the law side of the court. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406 (1953); Massaro v. United States Lines Co., 307 F. 2d 299 (C. A. 3, 1962); J. B. Effenson Co. v. Three Bays Corp., 238 F. 2d 611 (C. A. 5, 1956).

Aside from certain Congressional enactments, inapplicable here,[3] maritime law confers no right of action for wrongful death in state territorial waters. Hess v. United States, 361 U. S. 314 (1960); The Harrisburgh, 119 U. S. 199 (1886). Instead, as we recently pointed out in United New York Sandy Hook Pilots Assn' v. Rodermond Industries, Inc., — F. 2d — (C. A. 3, 1968), admiralty courts have traditionally entertained death actions "by permitting the wrongful death statute of the state in which the death

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3. The Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, creates rights only for seamen. The Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. §§ 761-767, applies only where the fatal injuries are sustained outside the territorial waters of the United States. And, as might be imagined, this suit does not concern those rights conferred by the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424 et seq., 33 U. S. C. § 901 et seq.

occurred to supplement the general maritime law. Western Fuel Co. v. Garcia, 257 U. S. 233 (1921). In these situations, maritime law adopts the state statute, and enforces it 'as it would one originating in any foreign jurisdiction.' Levinson v. Deupree, 345 U. S. 648, 652 (1953). • • •"

Eastern contends that since the fatal mishap occurred in the territorial waters of Massachusetts, that state's law, not Pennsylvania's, should have been chosen by the district court to supplement the general maritime law. It asserts that this contention is supported by its inability to find one reported case in this Circuit involving death upon state navigable waters where we have not applied the death statute of the state where the tort occurred. See, e.g., Meehan v. Gulf Oil Corp., 312 F. 2d 737 (C. A. 3, 1963); Hill v. Waterman S. S. Corp., 251 F. 2d 655 (C. A. 3, 1958), cert. denied, 359 U. S. 927 (1959); Curtis v. A. Garcia Y Cia., 241 F. 2d 30 (C. A. 3, 1957); The H. S., Inc., No. 72, 130 F. 2d 341 (C. A. 3, 1942); Klingseisen v. Constanzo Transp. Co., 101 F. 2d 902 (C. A. 3, 1939). But such a negative argument can hardly butress Eastern's position, since none of the above-cited cases considered the question of whether any state law other than that of the place of injury governed the rights and duties of the parties. Concededly, it was stated in The H. S., Inc., No. 72, 130 F. 2d at 343, that this court "made plain in Klingseisen v. Constanzo Transportation Co., supra, he who seeks to recover in admiralty under a State death statute for a maritime tort may do so only in accordance with the law of the State in which the tort occured," but analysis of the *Klingseisen* decision clearly shows that the court there went no further than to hold that when a plaintiff brings suit in admiralty under the Pennsylvania Wrongful Death Act, he is bound by the conditions and limitations of that statute, including the rule which bars recovery if the

decedent was contributorily negligent. In view of this analysis, the above-quoted statement made by this court in *The H.S., Inc., No. 72,* is obviously *obiter dictum,* and therefore does not constitute binding precedent in the consideration of the question now before us. What is significant about *Klingseisen* and other cases relied upon by appellant is that they are all chiefly concerned with the degree to which maritime law will adopt and enforce the law of a particular state; they are not, nor do they purport to be, authoritative guides for choosing between competing state statutes.

Appellant next suggests that we should follow what it considers to be a recognition by the Supreme Court in The Tungus v. Skovgaard, 358 U. S. 588 (1959), of a Congressional intent, in enacting the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. §§ 761-67, to leave to the several States the power [presmuably exclusive] to provide for claims arising out of fatal injuries sustained in their respective territorial waters. The problem before the Supreme Court in *The Tungus* involved, not a multistate conflict, but the interrelationship of maritime law with the law of a particular state, New Jersey. The decedent in *The Tungus* was fatally injured while aboard a vessel located in the navigable waters of New Jersey. His administratrix brought suit in admiralty under the Wrongful Death Act of New Jersey; no other state's law was relied upon. However, the administratrix did argue, in the alternative, that if the New Jersey Wrongful Death Act did not permit recovery, the federal courts could apply instead the full *corpus* of the maritime law so long as the state had enacted some type of wrongful death statute. This latter alternative, the Court believed, would conflict with "a clear congressional purpose," disclosed by the legislative history of the Death on the High Seas Act

> "* * * to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. 216, 66th Cong., 1st Sess. 3; H.R. Rep. No. 674, 66th Cong., 2d Sess. 3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of federal law. 59 Cong. Rec. 4482-4486." 358 U.S. at 593.

From our examination of the legislative history, we think it apparent that Congress, in enacting the Death on the High Seas Act, was primarily concerned with creating a federal right of action for death on the high seas that would not encroach upon the sovereignty of the states over deaths caused by maritime torts within state territorial waters.[4] The Court in *The Tungus* merely reflected this concern over retaining state sovereignty by rejecting the idea that federal maritime law could completely supplant and render inoperative the conditions and limitations of state death enactments. Given the nature and purpose of the Act, we do not think that Congress contemplated, much less intended, precluding the application of one state's death act to a maritime tort occurring in the territorial waters of another state when the former state has significant contacts with the parties and a substantial interest in the issue involved. We are even more certain that the Supreme Court in *The Tungus* attributed no such intent to Congress.

In our judgment, the necessary guidance for the proper disposition of this question has been furnished by the

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4. For an informative summary of the Act's legislative history, see Wilson v. Transocean Airlines, 121 F. Supp. 85 (N. D. Calif., 1954).

Supreme Court, not in *The Tungus,* but in Lauritzen v. Larsen, 345 U. S. 571 (1953), and Romero v. International Terminal Operating Co., 358 U. S. 354 (1959). In *Lauritzen, supra,* the central issue was what law should be applied to the Jones Act claim of a Danish seaman who, after joining a Danish vessel in an American port, was injured in the harbor of Havana, Cuba. The Court began its analysis of the various factors which, alone or in combination, generally influence the choice of law to govern a maritime tort claim upon the premise that

> "* * * Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. * * *" 345 U.S. at 582.

After reviewing the "connecting factors which either maritime law or our municipal law of conflicts regards as significant in determining the law applicable to a claim of actionable wrong," the Court held there was "an overwhelming preponderance in favor of Danish law. * * *" 345 U. S. at 592. Among the factors which the Court considered as possible sources of significant contact were: law of the flag, allegiance or domicile of the injured, allegiance of the defendant shipowner, place of contract, inaccessibility of foreign forum, the law of the forum, and the place of the wrongful act. In rejecting the place of the wrongful act as a predominant factor in determining the law governing maritime tort claims, the Court noted that the *lex loci delicti commissi* rule would indicate application of the law of Cuba, a country which had far fewer significant contacts with the injured seaman than did Denmark. The Court stated: "The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited

application to shipboard torts, because of the varieties of legal authority over waters she may navigate." 345 U. S. at 583.

Six years later, in Romero v. International Terminal Operating Co., 358 U. S. 354 (1959), the Court again depreciated the importance of the place of injury. Romero, a Spanish seaman who was injured aboard a vessel of Spanish flag owned by a Spanish corporation, while the vessel was temporarily berthed in New York, sued the shipowner in the United States District Court in New York under the Jones Act and the general maritime law of the United States. Reasoning toward its conclusion that Spanish law governed Romero's claims against the shipowner, the Court stated: "The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally." 358 U. S. at 382.

Guided by this precept, the Court of Appeals for the Fourth Circuit in McClure v. United States Lines Co., 368 F. 2d 197 (C. A. 4, 1966), a maritime death action, held that the choice of law rule enunciated in *Lauritzen* dictated a rejection of the law of France, the place of injury and death, in favor of the application of American maritime law, because "[a]ll of the really significant relationships are with this country, not with France." 368 F. 2d at 20.[5] In reaching this decision, the court observed that

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5. A similar approach was followed by the Court of Appeals for the Fifth Circuit in Symonette Shipyards, Ltd. v. Clark, 365 F. 2d 464 (C. A. 5, 1966), cert. denied, 387 U. S. 908 (1967). There, two American seamen were injured, one of them fatally, "on a ship registered in and flying the flag of the Bahamas and actually owned by a citizen of that country," "following a stop at Nassau for unloading of cargo." 365 F. 2d at 467. The court held that American law applied because it believed the most significant choice of law factor to be, not the place of injury, but the nationality of the injured and deceased seamen.

"* * * Lauritzen and Romero were forerunners of a general reappraisal and revision of the choice of law rules. * * *

"Under the new approach the laws of the wrong will be applied in wrongful death and personal injury actions 'unless some other state has a more significant relationship with the occurance and the parties as to the particular issue involved * * *.' In some factual situations, the place of the wrong may be quite adventitious, and all really significant relationships may be with some other state." 368 F. 2d at 201.

As indicated earlier, we think the facts of the instant case exemplify a situation where the place of the wrong was quite adventitious and where the most significant relations and contacts are with Pennsylvania rather than with Massachusetts. Pennsylvania is the state in which the contractual relationship between the decedent and Eastern arose; it is the situs of decedent's domicile; and of the administration of his estate. The fact that the place of injury is one other than the jurisdiction whose law is being applied is no more significant here than it was in *Lauritzen* and *Romero*. And in view of the broad choice of law principles enunciated in *Lauritzen* and *Romero*, we think the maritime law was correctly supplemented by the adoption and enforcement of Pennsylvania's Wrongful Death and Survival Acts.

Our reliance upon *Lauritzen* and *Romero* is fortified by the realization that these two cases were in the vanguard of many recent enlightened decisions attacking the usefulness and justice of rigid adherence to the strict *lex loci delecti* rule.[6] Equally as important in this regard is that

6. The Restatement (Second), Conflict of Laws, cites *Lauritzen* and *Romero* as examples of "[c]ases emphasizing the importance of applying the local law of the state which has the dominant inter-

an analysis of Eastern's position here reveals that it is essentially championing a vested rights approach to maritime wrongful death and survival actions. Historically, this approach, as embodied in the rule of *lex loci delecti,* dictated that the law of the place of the tort would invariably govern, because it was believed that the right to recover for a foreign tort was created or withheld by the law of the jurisdiction where the injury occurred. Application of this concept permitted of simplicity, uniformity, and predictability, but too often failed to take cognizance of legitimate interests of other states.[7] As a result, jurisdiction after jurisdiction has abandoned this simplistic approach in favor of more sophisticated, meaningful, and realistic choice of law criteria.[8] This trend was recognized and en-

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est in the decision of the particular issue * * *." Restatement (Second), Conflict of Laws § 145, Reporter's note at 20 (Proposed Official Draft, Part II, 1968). And the fourth edition of Goodrich, Conflict of Laws, relies heavily upon *Lauritzen* as a leading case in the formulation of the rule "that the law by which the forum is guided in determining the issues in tort cases is that of the state which is most significantly related to the issue * * *." Goodrich, Conflict of Laws, § 92 at 166; see also § 93 at 168 n. 16 (4th ed. Scoles 1964).

7. A lucid, critical analysis of the vested rights theory appears in Cook, The Logical and Legal Basis of the Conflict of Laws, ch. 1 & 13 (1942).

8. See, e.g., Watts v. Pioneer Corn Co., 342 F. 2d 617 (C. A. 7, 1965) (construing Indiana law); Reich v. Purcell, 63 Cal. Rep. 31, 432 P. 2d 727 (1967); Wartell v. Formusa, 34 Ill. 2d 57, 213 N. E. 2d 544 (1966); Wessling v. Paris, 417 S. W. 2d 259 (Ky. 1967); Balts v. Balts, 273 Minn. 419, 142 N. W. 2d 66 (1966); Clark v. Clark, 107 N. H. 351, 222 A. 2d 205 (1966); Babcock v. Jackson, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279 (1963); Casey v. Manson Constr. & Engineering Co., 428 P. 2d 898 (Ore. 1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A. 2d 796 (1964); Haumschild v. Continental Casualty Co., 7 Wisc. 2d 130, 95 N. W. 2d 814 (1959).

For an informative and interesting analysis of decision-making in conflicts cases, see Savers, The Choice-of-Law Process (1965). See also Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N. Y. U. L. Rev. 267 (1966); Leflar, Conflicts Law: More on Choice-Influencing Considerations, 54 Calif. L. Rev. 1584 (1966).

couraged by the Supreme Court in Richards v. United States, 369 U. S. 1 (1962), wherein the Court was called upon to determine whether the words "law of the place," as contained in the Federal Tort Claims Act, embraced the whole law of the place where the negligence occurred, including its choice of law rules, or only the internal law. After first noting the then-nascent trend of state departure from the *lex loci delecti* rule "in order to take into account the interests of the State having significant contact with the parties to the litigation," 369 U. S. at 12, the Court held that the "law of the place" included not only the internal law but also the choice of law rules of the state. This interpretation, the Court believed, provided the necessary flexibility "[s]hould the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable." 369 U. S. at 13.

Admiralty courts, like state courts, have an obligation to refrain from applying a rule when its application would be "inappropriate or inequitable." We strongly believe that it would be most inappropriate, if not inequitable,[9] to apply the law of Massachusetts to this case simply because Eastern's aircraft happened to crash into that state's navigable waters.

Accordingly, the judgment of the district court will be affirmed.

FREEDMAN, *Circuit Judge*, concurring.

I join in the affirmance of the judgment of the district court.

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9. In view of what has been decided, it is unnecessary for us to reach the question of whether the Massachusetts Wrongful Death Act is so offensive to traditional principles of maritime law that admiralty should decline to enforce it.

The opinions of Judge Staley and Judge Seitz present different reasons for the award of damages under the Pennsylvania wrongful death and survival statutes. Judge Staley's view is that while a tort action falls within the maritime law, an action may also be sustained under state law for the negligent breach of the contract of carriage which is outside the admiralty jurisdiction and therefore subject to the state choice of law rule. Judge Seitz would apply the state choice of law rule to all the claims because the action is on the law side of the court under the diversity jurisdiction and therefore is outside the admiralty jurisdiction. Chief Judge Hastie's dissent would apply maritime law to the tort action, but disagrees with Judge Staley's recognition of the right to waive the tort and sue in assumpsit, on the ground that it removes what is essentially a tort action from the pre-emptive jurisdiction of admiralty by a simple change in designation as an action for negligent breach of contract. Since the case would therefore be controlled by maritime law, the dissent would apply what it believes to be the well settled admiralty choice of law doctrine that the law of the place where the accident occurred governs.

I believe it is unnecessary to decide whether maritime law or state law applies because I reach the same result in either case.

If state law applies, either for the reasons given in Judge Staley's opinion or those given in Judge Seitz's opinion, I agree with them that the forum court must apply Pennsylvania's conflicts rules which under Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A. 2d 796 (1964), would invoke the so-called contacts doctrine and render the Pennsylvania rather than the Massachusetts law of damages applicable under the facts in this case. If federal maritime law applies, I would reach the same result because I agree with Judge Staley that the choice of law should in such a case

also be made under the contacts doctrine. Maritime law has exhibited a healthy capacity for development and growth and should not be immunized against acceptance of the now fully evolved theory of contacts in place of the rigid, simplistic principle of lex loci delicti.[1] It was unrealistic enough to apply to the fast moving automobile the rule of lex loci delicti which arose in the days of the horse and buggy. It seems to me even more extreme to apply the doctrine to airplanes which fly so high and at such tremendous speeds that state boundaries are invisible and are crossed without even being noticed.

In either case, therefore, whether by the application of state choice of law rules or maritime choice of law, I believe the award of damages was properly made under Pennsylvania's wrongful death and survival statutes.

SEITZ, *Circuit Judge*, concurring.

Contrary to my evaluation of the matter as a member of the panel which originally decided this case, I am now convinced that plaintiff's claims were also properly cognizable under the diversity jurisdiction of the district court; the factual prerequisites admittedly being present.

It is clear that the district court applied state law principles (Pennsylvania) in submitting the damage issue to the jury. Since the plane crashed into the navigable waters of the State of Massachusetts, the basic question then is whether maritime law precluded the assertion and recognition of state created rights of action under the district court's diversity jurisdiction.

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1. See my dissenting opinion in Mack Trucks, Inc. v. Bendix-Westinghouse Auto. A. B. Co., 372 F. 2d 18, 21 (3 Cir.), cert. denied, 387 U. S. 930 (1967).

It is clear that a right of action under maritime law arose as a result of this accident and could have been asserted under the admiralty jurisdiction of the district court. Weinstein v. Eastern Airlines, Inc., 316 F. 2d 758 (3rd Cir.), cert. denied 375 U. S. 940 (1963). But it does not follow that recognition of a state of common law right of action entertained under diversity jurisdiction was thereby foreclosed.[1] On the contrary, subject to exceptions hereinafter noted, it has been established for many years that such a party

> "* * * may, at his election, proceed in an action at law, either in the Circuit Court if he and the defendant are citizens of different States, or in a State court as in other cases of actions cognizable in the State and Federal courts exercising jurisdiction in common law cases, as provided in the eleventh section of the Judiciary Act. He may have an action at law, in the case supposed, either in the Circuit Court or in a State court, because the common law in such a case is competent to give him a remedy, and wherever the common law in such a case is competent to give a party a remedy, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act [footnotes omitted]." Steamboat Co. v. Chase, 16 Wall. 522, 533 (1872).

Certainly state-created remedies may not be invoked if maritime law has pre-empted the particular area involved. But I cannot find that the existence of a maritime right of action here (which as to the death claim must itself borrow a state statute) is so at war with the state right of action that the maritime law must be considered exclusive. Given the fact that the claim arose from the death of a passenger

1. See the "Saving Clause" in 28 U. S. C. A. § 1333.

on a commercial airplane which crashed into the navigable waters of a state, there would seem to be no basis for an overriding concern for the exclusive application of maritime law. Recognition of the state law claim works no impingement upon the rights of seamen and maritime workers. Indeed, it in no wise forecloses the assertion of the maritime rights of the plaintiff in the event he should elect to have the matter determined by such principles. But he asserts his state law rights. In the premises there seems to be no reason why, if he so elects, as here, his action may not be maintained as a state law action under the district court's diversity jurisdiction.

The approach here taken seems to find explicit support in a long line of United States Supreme Court opinions. See the general discussion by Mr. Justice Frankfurter in Romero v. International Term. Co., 358 U. S. 354, 359-381 (1959), and see Mr. Justice Brennan's statement on Page 398; Just v. Chambers, 312 U. S. 383, 389 (1941); Norton, Assignee v. Switzer, 93 U. S. 355 (1876); Steamboat Co. v. Chase, above. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406 (1953) is here instructive. The court held that a longshoreman's claim for negligence for an on-duty injury was governed by maritime law. However, the court noted particularly that the plaintiff's "complaint asserted no claim created by or arising out of Pennsylvania law." The court did go on to say that "Even if Hawn [plaintiff] were seeking to enforce a state created remedy for this right, federal maritime law would be controlling" (p. 409). First, I note that this case involved an attempt to apply the state common law defense of contributory negligence. Its application was held to be incompatible with maritime principles. But of more importance here, the court went on to say "While states may sometimes supplement federal maritime policies,[3] a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Con-

gress or by interpretative decisions of this Court." In its footnote 3 the court cited, inter alia, Just v. Chambers, 312 U. S. 383, 387-392 (1941). It is noteworthy that the discussion on pages 387 to 392, to which the Supreme Court refers, includes an explicit recognition that state created rights of action for wrongful death, inter alia, may be asserted even though the wrong occurred in the navigable waters of a state, and this is so apart from maritime law. I am therefore satisfied that the claim here asserted did not lose its vitality as a state law claim because it arose from an accident occurring in the navigable waters of a state. Nor do I think the language in footnote 7 in Hess v. United States, 361 U. S. 314 (1960) can be considered to constitute an overruling of the long line of Supreme Court opinions to which I have referred. The court did state, inter alia, in the footnote:

> "There can be no question but that Oregon would be required to apply maritime law if this were an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law. The Plymouth, 3 Wall. 20, 35, 36."

I read that language to mean that where the matter is asserted as a matter of maritime law the tort action is governed exclusively by maritime law principles. I do not read it to mean that all state remedies are thereby foreclosed.

I therefore conclude, as plaintiff contends, that his claim was properly cognizable as a state law claim and thus properly within the district court's diversity jurisdiction under the present facts. My analysis would seem to render inapplicable such cases as Carlisle Packing Co. v. Sandanger, 259 U. S. 255 (1922).

The appellant does not challenge any aspect of the finding of liability on this appeal. The issue relates solely to

the applicable law of damages. It is clear that in determining such issue under its Survival Statute, Pennsylvania will apply its so-called "contacts" doctrine. Griffith v. United Airlines, 416 Pa. 1, 203 A. 2d 796 (1964). I agree with Judge Staley's opinion that the facts here amply justified the district court, as a matter of Pennsylvania law, in finding that Pennsylvania would apply its own law to the damage issue. I am equally satisfied that, under *Griffith*, Pennsylvania would apply its "contacts" doctrine to the determination of the damage issue under its Wrongful Death Statute. This being so, I think the district court was equally justified under the established facts in applying Pennsylvania law to that damage claim.

I therefore conclude that the Pennsylvania law was properly applied by the district court to the damage issues here. I am also satisfied, under the circumstances, that this did not constitute any violation of the appellant's constitutional rights. I emphasize that my opinion is not intended to indicate any view with respect to the constitutionality of the application of the "contacts" doctrine on the issue of liability.

Finally, since I believe the judgment below can be affirmed without consideration of any issue of substantive maritime law, I need not decide what state law would be "borrowed" in the event maritime law was deemed controlling.

I vote to affirm the judgment of the district court.

HASTIE, *Chief Judge*, with whom MCLAUGHLIN and GANEY, *Circuit Judges*, join, dissenting.

Because final disposition of this and numerous companion cases has been so long delayed by the need for judi-

cial disposition of various important legal questions that the parties to this litigation have raised and contested seriatim in trial and appellate courts, this statement of dissenting views has been drafted more summarily and with less documentation than otherwise might have been desirable. Moreover, the basic supporting argument has already been stated in the opinion promulgated March 30, 1967 by the then unanimous panel of this court which originally heard this appeal. Adhering to that view of the case, we who now dissent are content merely to supplement that opinion with a short statement of what we believe to be the basic errors in the analysis of the present majority.

The majority opinion reasons that this action in a United States District Court for the wrongful death of a passenger, negligently caused when the appellant's commercial aircraft crashed in navigable water of Boston harbor, may properly be adjudicated as a diversity action on a Pennsylvania contract, with the result that the federal court is obligated to apply Pennsylvania rules of choice of law and to grant the relief and remedy which Pennsylvania law provides for damage caused by a breach of contract. Thus, the proper characterization of the wrong in suit as a maritime tort, or a breach of contract, or either at judicial pleasure, is an important, perhaps decisive, threshold question.

The contractual theory of liability is that the carrier breached a promise it had made to the passenger that it would not be negligent in transporting him. The main trouble with that argument is that the alleged promise is a legal fiction. The majority opinion concedes this, fairly stating that no contract of carriage was in evidence and no finding was made that the alleged contract of carriage did in fact include any such promise. Indeed, in the words of the majority opinion, "the common carrier's contractual

obligation to transport its passengers in a nonnegligent manner is not bargained for by the respective parties; rather it is imposed by law." That statement is precise and accurate, except for the internal contradiction which results from the inclusion of the adjective "contractual". The difference between a legal duty to perform in accordance with a bargain and an obligation imposed *in invitum* to avoid injury to another is the fundamental distinction between contract and tort. Therefore, we adopt a legal fiction if we say that the wrong proved in this case is a breach of contract. Moreover, on the present record, to invoke the ancient common law procedural device of waiving the tort and suing in "assumpsit" is merely to formalize and Latinize the fiction without substantiating it. In reality, the wrong here is a tort and nothing else.

Indeed, this court has already held in another case growing out of the same accident that the catastrophic crashing of the appellant's aircraft in navigable water within a marine league of the Massachusetts shore was a maritime tort within the admiralty jurisdiction of the United States and its courts. *Weinstein v. Eastern Airlines, Inc.*, 3d Cir. 1963, 316 F. 2d 758.[1] The majority undertakes to counter this holding by arguing on the authority of *Griffith v. United Air Lines, Inc.*, 1964, 416 Pa. 1, 203 A. 2d 796, that Pennsylvania law would recognize and act upon an alternative view of this case as a substantiated claim for breach of contract. This is at least very doubtful, if only because, as we already have pointed out, no contract is in evidence here. But more fundamentally, when, in the course of litigation in a federal court, it becomes necessary

1. The *Weinstein* opinion recognized the possibility that a breach of warranty or other contractual undertaking could also be involved. But *Weinstein* did not reach the present question whether the wrong actually established at trial was a tort or a breach of contract.

to determine whether the wrong in suit is a maritime tort or a breach of contract, the federal court must decide for itself what characterization is proper, without any duty of deference to any state view. And when it appears that the wrong in suit has the essential character of imposed liability for negligent personal injury and can be analyzed as a breach of a promise only by invoking a legal fiction, the alleged state view is no more persuasive than it is authoritative.

This conclusion has been reached without any differentiation between the survival claim and the wrongful death claim. But even if the survival claim could be characterized as a contract claim of the decedent to which his kin succeeded upon his death, the wrongful death claim will not bear any such restructuring.[2]

Admittedly, the wrongful death claim is an original claim of someone other than the decedent for negligent invasion of the claimant's own economic interests. The carrier had no contract with this claimant and made no promise to the passenger to do anything for his dependents. The majority opinion suggests no way, and we can think of none, in which this claim can logically be treated as contractual. *Cf. Miller v. Preitz,* 1966, 422 Pa. 383, 221 A. 2d 320; *DiBelardino v. Lemmon Pharmacal Co.,* 1965, 416 Pa. 580, 208 A. 2d 283.

But even without characterizing this suit as contractual, the majority would allow recovery measured by the wrongful death and survival statutes of Pennsylvania. Reasons for rejecting that conclusion are stated in the opinion of the panel which first heard this appeal. Analysis begins with the conception that the applicable rules of maritime law are part of a controlling body of national

2. The *Griffiith* case upon which the majority relies was an action on a survival claim, not a wrongful death claim.

law with state law as such playing no authoritative role. Though diversity of citizenship is alleged and established in this case, the rules of *Erie R. R. v. Tompkins*, 1938, 304 U. S. 64 and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 1941, 313 U. S. 487, have no proper application. *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U. S. 406.[3] However, in fashioning admiralty remedies for wrongful death in waters adjacent to a state, the federal courts uniformly have seen fit to create an admiralty remedy equivalent to the statutory wrongful death remedy of the state within whose territorial waters the wrong occurred. *The Tungus v. Skovgaard*, 1959, 358 U. S. 588.

Admiralty might have employed some other device, for example, allowing recovery equivalent to that provided by the Death on the High Seas Act. 46 U. S. C. §§ 761-67. Or the less generous death benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 909, could have been used as a model. Indeed, courts of admiralty, adhering to historic maritime precept, might have refused to allow any death recovery until Congress should so legislate. Or, admiralty might inquire in each case what state has the most impressive contact, or aggregate of contacts, with the parties and transactions involved in the fatal accident and borrow the remedy of that state for wrongful death.

This last alternative, which the majority now adopts, would introduce new variables and new elements of uncertainty into the determination of admiralty awards for wrongful death. It also would invite forum shopping and lead to litigated controversy, such as this disaster already

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3. Even where suit is brought in a state court for maritime injury caused by a shoreside negligent act, the state court must apply national maritime law. *Carlisle Packing Co. v. Sandanger*, 1922, 259 U. S. 255.

has produced, over the removal of causes. It is difficult to believe that the result of this change would be an improvement upon the present practice of consistently borrowing the remedy of the place of wrong, one state that always is substantially concerned with and historically has provided a remedy for fatal accidents occurring within its borders.

It is noteworthy in this connection that even the majority opinion speaks of federal concern to respect "the sovereignty of the states over deaths caused by maritime torts within state territorial waters." State "sovereignty" seems an overstatement of what undoubtedly is legitimate state concern in such a situation as this since paramount authority in the maritime realm is national rather than state. But the majority is correct that recognition of the special interest of a state in harm suffered within its geographic boundaries is implicit in the federal borrowing of wrongful death remedies of that state. In this case the logical result of the point made by the majority would be to allow a maritime wrongful death recovery equivalent to that provided by the law of Massachusetts.

Conceding that in no reported case involving death in territorial waters has the Supreme Court sanctioned an admiralty borrowing of the wrongful death act of any state other than that within whose territorial waters the fatal accident occurred, the majority finds analogical justification for a different procedure here in *Lauritzen v. Larsen*, 1953, 345 U. S. 571 and *Romero v. International Terminal Operating Co.*, 1959, 358 U. S. 354. But both of these cases posed the question whether the maritime law of one nation or of another nation should be recognized as determinative of liability for a particular maritime injury. Here, in contrast, the only maritime law involved is our own federal law, and its authority in the present context is

unchallenged. Moreover, in the *Lauritzen* case the dominant considerations were that the ship flew the Danish flag and the injured seaman and the defendant shipowner were Danish nationals. It is of no relevance in our case that in the adjudication of maritime tort claims the national law of the place of injury may be subordinated to the national law of the flag and of the parties' allegiance. On the other hand, it is particularly striking that in *Lauritzen* short shrift was accorded the argument that the law of the United States should apply because the plaintiff seaman had been hired in the United States. The Court said: "We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort." 345 U. S. at 589. If anything in *Lauritzen* is helpful in our case, it is that language.

The *Romero* case refused to apply a statute of the United States, the Jones Act, to a maritime tort involving Spanish parties on a Spanish ship in New York harbor. There too the dominance of flag and nationality determined the choice between the maritime laws of different nations. This decision has no relevance here where our accepted starting point is the dominance of federal law over local law in the maritime area.

Finally, we have not overlooked the argument, not considered by the majority, that admiralty should fashion the details of its own wrongful death remedy without regard to any special limiting provisions of the wrongful death statute of any concerned state. To us this would make sense. It also would make for desirable uniformity in maritime law. But unless and until the Supreme Court shall adopt this position, as unsuccessfully urged by the four dissenting Justices in *The Tungus v. Skovgaard, supra,* we think an inferior federal court is obligated to

allow and define recovery here in the manner indicated by the wrongful death law of Massachusetts.[4]

For the reasons stated in this opinion and in the opinion of this court on first hearing of this appeal, we who dissent would reverse the judgment of the district court and order a new trial on the issue of damages.

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4. Footnote 9 of the majority opinion suggests that the Massachusetts limitations on recovery for wrongful death may be "so offensive to traditional principles of maritime law that admiralty should decline to enforce" them. Of course admiralty traditionally allowed no recovery for wrongful death. Thus, recovery as limited by Massachusetts would be a liberalization of the historic principles of admiralty law.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16328

DONALD A. SCOTT, ADMINISTRATOR OF THE ESTATE OF THOMAS L. MOODY, DECEASED

v.

EASTERN AIR LINES, INC., AND LOCKHEED AIRCRAFT CO. AND GENERAL MOTORS CORPORATION AND UNITED STATES OF AMERICA
EASTERN AIR LINES, INC.,
Appellant

(D. C. CIVIL No. 30346)

Present: HASTIE, *Chief Judge,* and MCLAUGHLIN, KALODNER, STALEY, GANEY, FREEDMAN and SEITZ, *Circuit Judges.*

In accordance with the Opinion of this Court on Rehearing in the above-entitled case filed this day.

It is ORDERED that the judgment of this Court filed March 30, 1967 in this case be, and it hereby is recalled.

By THE COURT,

WILLIAM H. HASTIE,
Chief Judge.

Dated: June 28, 1968

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16328

DONALD A. SCOTT, ADMINISTRATOR OF THE ESTATE OF THOMAS L. MOODY, DECEASED

v.

EASTERN AIR LINES, INC., AND LOCKHEED AIRCRAFT CO. AND GENERAL MOTORS CORPORATION AND UNITED STATES OF AMERICA
EASTERN AIR LINES, INC.,
Appellant

(D. C. CIVIL No. 30346)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, GANEY, FREEDMAN and SEITZ, *Circuit Judges*.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 28, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN,
Clerk.

June 28, 1968

APPENDIX D.

Agreed Statement of the Case Pursuant to Rule 76.

I. Introductory Statement.

In order to facilitate the disposition of the issues now on appeal before the United States Court of Appeals for the Third Circuit in the above-captioned matter, the parties thereto, with the approval of the Court below, hereby submit this agreed statement of the case.

This agreed statement is made for the purpose of this appeal only and in no event shall this statement constitute an admission in any of the related cases pending in the United States District Court for the Eastern District of Pennsylvania or elsewhere.

II. The Issue Raised by This Appeal.

To promote the prompt resolution of this appeal, Eastern Air Lines, Inc. (hereinafter called "Eastern"), has specifically limited the questions raised on this appeal solely to the issue of what law governs the measure of damages recoverable by plaintiff. The Court below held that Pennsylvania law governed. Eastern has chosen to forego pressing any issues on appeal as to liability in this case for the sole purpose of enabling an expeditious resolution of the questions relating to measure of damages.

Defendant will contend in this appeal that (1) the applicable principles of general maritime law require reference to the laws of Massachusetts, in whose territorial waters the fatal injuries were sustained; and (2) that even if Pennsylvania law is applicable under Pennsylvania choice of law rules, the laws of Massachusetts are applicable as to measure of damages.

III. The Case Below.

On October 4, 1960, a Lockheed Electra aircraft being operated by Eastern as Flight 375 took off from Logan International Airport, Boston, Massachusetts, struck a flock of birds shortly thereafter while still over land, and then crashed into navigable waters of Boston Harbor. The Flight 375 was a scheduled passenger flight operating between Boston, Massachusetts, and Atlanta, Georgia, with the first intermediate stop scheduled at Philadelphia, Pennsylvania. The crash resulted, as the jury found, from the negligence of Eastern, and caused personal injuries and sixty-two deaths among the seventy-two passengers and crew.

Thomas L. Moody, plaintiff's decedent herein, was a passenger on the aircraft and was killed in the crash. No evidence was presented that his death was other than instantaneous.

The Complaint filed by the personal representative of decedent alleged that the fatal injuries were the result of "the negligence, breach of warranties, and breach of contract of defendants . . . ."[1] The Complaint named Eastern, General Motors Corporation, Lockheed Aircraft Corporation and the United States of America as defendants. This case was consolidated for trial on the issue of liability with three other cases in which substantially identical Complaints had been filed.

In accordance with pre-trial procedures established by the Court below, the parties were required to state the issues to be relied on at trial. The issues as so stated by the plaintiff with respect to Eastern were (1) negligence with respect to the design and operation of the airplane; (2) negligence in the use of this airplane at Logan Airport

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1. Relevant docket entries from the proceeding below are attached hereto.

in view of known field conditions; and (3) negligence in permitting the airplane to operate with a defective co-pilot's seat. The breach of warranty theory was specifically waived by plaintiff.

Lockheed, a California corporation with its principal place of business in California, designed and built the subject aircraft, principally at its facility in Burbank, California.

General Motors, a Delaware corporation with its principal place of business in Michigan, through its Allison Division, designed and manufactured the engines on the subject aircraft, chiefly at its plant in Indianapolis, Indiana.

The Federal Aviation Agency (or its predecessor, the Civil Aeronautics Administration) certificated the aircraft type and the particular aircraft after tests conducted principally in California and in Indianapolis, Indiana. Federal Aviation Agency presonnel also manned and operated the Control Tower facility at Logan Airport at Boston.

Logan Airport was owned, maintained and operated by the Massachusetts Port Authority. The Massachusetts Port Authority is a body politic incorporated, specially created by act of the Massachusetts legislature at Section 91 App. of the Massachusetts General Law.

Eastern is incorporated under the laws of the State of Delaware and does business in various states in the eastern United States, including Pennsylvania. Its principal place of business is neither in Pennsylvania nor in Massachusetts.

Prior to trial, plaintiff, with Court approval and without objections from the other defendants, dismissed his claim as to General Motors Corporation.

At trial, plaintiff offered evidence of various acts and/or omissions of the defendants which plaintiff contended established negligence. It was not contended that

any negligent act contributing to this crash took place in Pennsylvania.

In accordance with procedures established by the Court below, the jury first heard liability evidence only and, after charge on the law by the Trial Judge, the jury returned a verdict in favor of plaintiff and against Eastern on the liability issue. The jury found in favor of Lockheed and against plaintiff on liability.[2]

Decedent, Thomas L. Moody, was born in Crawfordsville, Indiana, and for some fifteen years prior to his death had been employed by Sears Roebuck and Co. at various locations, including Buffalo, New York, and Atlanta, Georgia. From 1955 until his death, Mr. Moody was a territory field man for Sears with an office in the Sears' Administration Building in Philadelphia. His territory extended from Maine to Virginia and west to about the center of Ohio.

From June 1, 1955, until his death, Mr. Moody resided in the Presidential Apartments in Philadelphia, Pennsylvania.

The ticket on which decedent was travelling at the time of his death was issued in Philadelphia by Northeast Air Lines for a trip from Philadelphia to Boston on October 3, 1960, on Northeast Air Lines, and for a return trip from Boston to Philadelphia on October 4, 1960, on Eastern Flight 375. A copy of the ticket is attached hereto as "Exhibit A".

Decedent's trip to Massachusetts was on his employer's business in connection with the opening of a new store in Sagus, Massachusetts.

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2. The claim against the United States, heard by the Trial Judge sitting without a jury, has not yet been decided. The Court has, however, made final the judgment as to Eastern in accordance with Rule 54(b). See "Exhibit D" attached hereto.

At his death, decedent was unmarried and without children and was survived by a brother, Robert of Los Angeles, California. Decedent left a Will naming his brother as sole beneficiary and naming a Georgia bank as Executor. The bank declined to act. Initially, Letters of Administration were granted by the Register of Wills of Philadelphia County to decedent's brother, Robert, who, however, later resigned with the permission of the Orphans' Court of Philadelphia. Thereafter, Donald A. Scott of Philadelphia, plaintiff herein and a partner in the law firm of plaintiff's trial Counsel, was appointed successor Administrator prior to the commencement of this action on October 2, 1961.

At his death, decedent owned personal property situated in Pennsylvania but no real property anywhere. The debts of the estate, all owing to Pennsylvania creditors, were approximately $1,000.00. The estate was solvent. Pennsylvania inheritance taxes of $1,053.69 were paid by the estate. In addition, the Commonwealth of Pennsylvania asserted a claim of $4,773.03 in inheritance taxes on decedent's interest in the Sears Roebuck saving and profit sharing pension fund passing out of his estate to beneficiaries residing in North Carolina who had been designated by decedent in accordance with the rules of the plan. This claim was resisted by the estate. At the time of his death, decedent had a lease on his apartment in Philadelphia.

At the conclusion of the damage evidence, the Court below refused Eastern's Points for Charge to the effect that damages could be awarded only in accordance with the laws of Massachusetts. The Court charged the jury on the damage issue in accordance with the law of Pennsylvania. The charge is attached hereto as "Exhibit B".

All appropriate exceptions to the charge were duly taken by Eastern.

The jury awarded damages of $2,500.00 under the Pennsylvania Wrongful Death Act and $45,000.00 under the Pennsylvania Survival Act. Judgment was entered in those sums on November 28, 1966. A copy of the Judgment is attached hereto as "Exhibit C". By Order dated December 6, 1966, the Court below made final the judgment as to Eastern in accordance with the requirements of Federal Rules of Civil Procedure 54(b). A copy of the Order is attached as "Exhibit D".

On December 7, 1966, Eastern filed its Notice of Appeal, a copy of which is attached hereto as "Exhibit E".

All of the foregoing constitutes the agreed statement in accordance with Federal Rules of Civil Procedure 76 and shall be the record on appeal.

RAWLE & HENDERSON,
By J. GRANT MCCABE, III,
1900 Packard Building,
Philadelphia, Pennsylvania,
Attorneys for Defendant Eastern Air Lines, Inc.

Of Counsel:
MORGAN, LEWIS & BOCKIUS.

JOHN R. MCCONNELL,
John R. McConnell,
2107 Fidelity-Philadelphia Trust Building,
Philadelphia, Pennsylvania,
Attorney for Plaintiff.

The foregoing is approved by the District Court.

HAROLD K. WOOD,
U. S. D. J.

Relevant Docket Entries.

October 2, 1961—Complaint filed.

October 2, 1961—Summons exit.

October 2, 1961—Plaintiff's demand for jury trial against all defendants other than the United States, filed.

October 24, 1961—Appearance of Rawle & Henderson, Esqs. for Eastern Air Lines, Inc. filed.

October 24, 1961—Answer of Eastern Air Lines, Inc., filed

October 3, 1966—Jury and Alternates (4) called and sworn.

October 4, 1966—Trial. Witnesses sworn.

November 16, 1966—VERDICT: In favor of plaintiffs and against defendant Eastern Air Lines, Inc.; in favor of defendant Lockheed Aircraft Corporation and against plaintiffs. (Jury polled)

November 22, 1966—Same jury sworn to try this case as to damages. Trial. Witnesses sworn.

November 28, 1966—VERDICT: The Jury returns a verdict in the form of answers to interrogatories in favor of plaintiff and against Eastern Air Lines, Inc., in the sum of $2500.00 under the Wrongful Death Act and in the sum of $45,000.00 under the Survival Act. Motion of Eastern Air Lines for directed verdict—Denied.

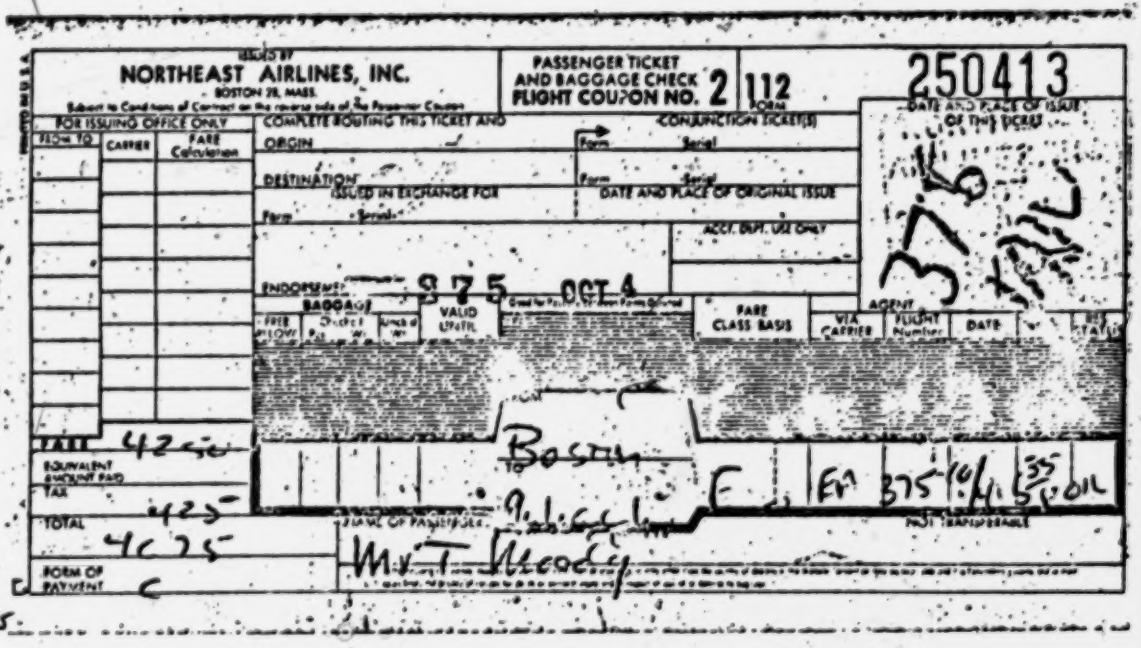
November 28, 1966—Judgment in favor of plaintiff and against Eastern Air Lines, Inc., in the sum of $2500.00 under the Wrongful Death Statute, and in the sum of $45,000.00 under the Survival Statute, with costs; in favor of Lockheed Aircraft Co. and against plaintiff, with costs; and action against General Motors Corp. is Dismissed, filed.

December 6, 1966—Order of Court directing execution on the judgment to proceed, filed.

December 7, 1966—Notice of appeal by Eastern Air Lines, Inc., filed.

December 7, 1966—Copy of notice to Clerk, U. S. Court of Appeals, filed.

December 7, 1966—Bond of Eastern Air Lines, Inc., for costs on appeal in the sum of $250.00 with the Aetna Casualty & Surety Co. as surety, filed.



ISSUED BY
NORTHEAST AIRLINES, INC.
BOSTON 28, MASS.
Subject to Conditions of Contract on the reverse side of the Passenger Coupon

PASSENGER TICKET AND BAGGAGE CHECK
FLIGHT COUPON NO. 2

112 FORM

250413

DATE AND PLACE OF ISSUE OF THIS TICKET

FOR ISSUING OFFICE ONLY
FROM TO | CARRIER | FARE Calculation

COMPLETE ROUTING THIS TICKET AND CONJUNCTION TICKET(S)
ORIGIN
DESTINATION
Form Serial
ISSUED IN EXCHANGE FOR
Form Serial
DATE AND PLACE OF ORIGINAL ISSUE

ACCT. DEPT. USE ONLY

ENDORSEMENT 8 7 5 OCT 4

BAGGAGE | VALID UNTIL | FARE CLASS BASIS | VIA CARRIER | FLIGHT Number | DATE | W | NOT VALID

FARE 42 50
EQUIVALENT FARE PAID
TAX
TOTAL 42 50

Boston E FA 375 10 4 35 OIL

NAME OF PASSENGER
M r T Moody

NOT TRANSFERABLE

FORM OF PAYMENT C

VS

EXHIBIT B.

Charge of the Court.

WOOD, *J.*:

Members of the jury, as I told you the other day, I hope over this long weekend you have had time to concentrate on the facts presented to you, because after all you must determine them, and they are rather important in this case, extremely important.

With the consent of counsel again, I do not intend to go over all of the duties and obligations of the jury in detail in respect to legal principles, since it has only been a few days since I outlined them to you, but briefly they are as follows:

You will recall that I explained to you carefully that the credibility of witnesses is a matter for your determination. In other words, you give the testimony of the witness whatever weight you think it deserves and that it is believable and credible.

Incidentally, in this particular case there is no evidence presented on behalf of the defendant whatsoever.

The burden of proof, of course, is on the plaintiff on this issue of damages, as it was on the question of liability. The opening statements of counsel and their arguments to you should be given careful consideration, but you will recall that I stated that the recollection of the evidence is within your determination alone. If I or counsel in their opening address or their summation make any reference to the evidence which does not agree with yours, then you should completely disregard it.

Members of the jury, as to the issues in this case we are concerned with the single problem as to what damages

Donald A. Scott, Administrator of the Estate of Thomas L. Moody, is entitled as against Eastern Air Lines, Incorporated. At this posture of the case your decision will be based on the issue between them.

Scott has brought these actions as the administrator of Moody's estate and as such is entitled to recover damages under two separate Acts, one called the Wrongful Death Act and the other referred to as the Survival Act, which I charge you are applicable in this case.

Under the Wrongful Death Act, he can only recover, that is, Mr. Scott, can only recover the funeral expenses and the expenses of administration necessitated by reason of the injuries causing death. These will be of slight value relatively in this case, and you will have to use your own judgment, members of the jury, as to what a reasonable amount would be in that regard, since the evidence, if any, is scant. But base your own judgment in that regard on your personal experience in life. You are experienced people, you are well chosen. Use your own judgment. If you come to the conclusion that there is no evidence, then find nothing. If you find from your own experience in life and the affairs of us all in everyday life what a reasonable amount would be, then find in that amount.

Now we come to the second statute of Pennsylvania which provides for damages in favor of the plaintiff. That is, what I mentioned a moment ago, the Survival Act. There, in simple language—bear this in mind, members of the jury—there, in simple language, the plaintiff is entitled to recover what may be referred to as the loss to the decedent's estate as a result of his death caused by the negligence of another. This Act contemplates that had he not died as a result of the negligence of another, in this case Eastern Air Lines, Incorporated, and who, you have already found, was responsible therefor, the plaintiff is en-

titled to recover a lump sum. That is to say, an amount of money equal to all the money the decedent would have earned from today to the end of his life, reduced to its present value as I shall explain to you, and less what he would have spent on his own maintenance.

To simplify it, your verdict must be in two amounts. First, what were the funeral expenses and expenses of administration which were necessitated by reason of this accident, and the second in whatever amount you would have found he earned over his lifetime reduced to its present worth minus the probable cost of his own maintenance.

In addition to what I have previously told you, you will in considering damages recall the evidence as to the earning capacity of Mr. Moody from the date of this accident on October 4, 1960, until today, and you will take into consideration the amount of money which he would have earned during approximately six years. This amount in toto minus the cost of maintenance for those six years should be included as damages to the plaintiff.

The cost of maintenance is that sum which a decedent would probably spend, based upon his station in life, for food, clothing, shelter, medical attention and some recreation. Maintenance is meant to signify reasonable living expenses.

You have heard an admitted expert on actuarial tables who has given you his opinion as to present values. As I have previously stated to you—and he is admittedly qualified—you will give his testimony whatever weight it deserves. In considering his testimony you must consider not only life expectancy but work expectancy and the possibility from all the evidence what this man's future work and life expectancy would have been.

You have heard the witness on Tuesday explain to you what present value or present worth is from the standpoint

of an actuary, and in general what he stated was correct, but I will repeat it again to you on that subject.

Now, in applying this principle, however, you must bear in mind, members of the jury, that in determining future damages the item of damages relating to the past, that is to say, from 1960 to 1966, is not to be included as damages as to the future, and it is not to be reduced to present value. In other words, those damages have been sustained as of today. When I speak of present value I refer to the future.

In applying this principle of present value to future lost earning capacity, you must remember that the principal sum awarded must be consumed in the process. Again I am speaking of the future. A sum of money given now of sufficient size to provide, from interest only, the amount of total lost earning power, would be excessive, since the entire capital would remain unimpaired at the expected end of the life expectancy. When one earns money by his intellectual and manual labors, he receives such sums in periodic payments, that is, weekly, bi-monthly, or monthly. Therefore, if my debt will be $1 one year from today and $1 two years from today, to discharge both debts I would not pay my debtor two times 94 cents. I would pay him 94 cents for the first dollar, but only about 89 cents for the second. That figure, at simple interest for two years, would produce the dollar owed at that time. The just cash equivalent of a dollar due in three, four, five or more years would be increasingly smaller.

In summary, members of the jury, you are to determine the following sums and total them under the Wrongful Death Act. First, the funeral expense. Second, the expenses of administration necessitated by reason of injuries causing death.

Members of the jury, under the Survival Act you shall determine the following sums and total them. First, the amount of lost past earnings from the date of the accident to the date of trial less what Mr. Moody probably would have spent for his own maintenance, but that sum is not reduced to present worth. Second, the amount of future earnings from this date less the probable cost of his own maintenance during the time he would have lived and reduced to present worth.

Now, members of the jury, you will have no difficulty in recalling the evidence as to the age of Mr. Moody and his position in life. You will also recall the evidence relating to his life and his employment with Sears and Roebuck, and the testimony relative to his salary, which are matters which you must determine from the evidence. You will also recall the evidence as to his pension fund and his investments in savings bonds.

As I did previously, I am going to submit interrogatories to you which read as follows:

1. What are the damages recoverable under the Wrongful Death Act?

2. What are the damages recoverable under the Survival Act?

Members of the jury, in answering these interrogatories, as to Interrogatory No. 1, you will simply consider and determine reasonably what the funeral bill and expenses of administration necessitated by reason of the accident amount to. If you should conclude that there is no evidence to support the figure you will have to rely on your own judgment, or you have the privilege of not allowing anything, as I previously stated. This will conclude your deliberations insofar as the Wrongful Death Act is concerned.

You will then consider, as I have told you, the Survival Act, which briefly, and without referring back to the earlier part of my charge, constitutes in effect the amount of the estate which this man would have left for his lawful survivors at the time of his death had this tragedy not occurred. That is the key to your deliberations.

In determining what that amount should be, you will, of course, consider his station in life, education, background, his future, as you determine it from the evidence, and arrive at a figure which as reasonable people you find would be his estate when he died had he lived to survive this crash.

Members of the jury, you may conclude that during the past six years the decedent would have retained property over and above what he would have spent on his own maintenance. This could become a part of his estate, in which case you would add that sum to your verdict under the Survival Act. That has been argued to you and you have heard the figures on it. I am sure you will give them due consideration.

Finally, members of the jury, I have been asked to charge you as follows, and I agree with the request.

I instruct you that on the uncontradicted evidence you may find that Sears' management of the pension and profit-sharing fund and the resulting increase in the value of Mr. Moody's share is part of his compensation as an employee of Sears, and you may so consider it.

Furthermore, it has been argued that he does not have stock. Of course, members of the jury, he does not have stock because unfortunately he is not living. However, any stock that he owned at the time that he died is a part of his estate, and any stock that he might have accumulated in the future based on your own judgment would also be a part of his estate.

There has been some reference here—and I leave this entirely to your recollection—as to the computations as to the present value of his contributions in connection with the contributions of Sears, Roebuck. You will remember the unit plan. You will remember the value of the stock, and you will have to, members of the jury, under your oaths, conclude had he lived until sixty-three, which I don't think there is any doubt was the retirement plan, what would have been the value of those contributions, which, as I say, were part of his compensation, and how much of that would have been part of his estate had he died.

Again I say from this time on it must be reduced to present worth. As to the period from 1960 to 1966, it is not reduced to present worth. It is the value of all of that less his cost of maintenance, and in the future it is the same except, as I say, in determining that amount you must reduce that to its present worth.

Are there any questions?

Mr. McConnell: No, Your Honor. Thank you.

Mr. McCabe: No, sir.

The Court: Members of the jury, the marshal will be sworn. He will take you to lunch. I am sorry it is so late again, but get back as quickly as you can to begin your deliberations. Give this very, very careful consideration.

(The marshal was sworn.)

The Court: All right. Take the jury to lunch, and when you return and your deliberations begin, Mr. Wells will kindly come to my chambers.

(The jury left the courtroom at 12:23 o'clock P. M.)

EXHIBIT C.

Judgment.

Before WOOD, *J.*:

AND Now, to wit: November 28th, 1966, in accordance with the Verdict of the Jury, it is

ORDERED that Judgment be and the same is hereby entered in favor of Donald A. Scott, Administrator of the Estate of Thomas L. Moody, Deceased, Plaintiff, and against Eastern Air Lines, Inc., Defendant, on Plaintiff's cause of action under the Pennsylvania Wrongful Death Statute in the sum of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars, and on Plaintiff's cause of action under the Pennsylvania Survival Statute in the sum of Forty Five Thousand and 00/100 ($45,000.00) Dollars, together with costs, and it is

FURTHER ORDERED that Judgment be and the same is hereby entered in favor of Lockheed Aircraft Co., Defendant, and against Donald A. Scott, Administrator of the Estate of Thomas L. Moody, Deceased, Plaintiff, with costs, and it is

FURTHER ORDERED that in accordance with the action of the Court pursuant to agreement of counsel, the action against General Motors Corporation, Defendant, be and the same is hereby Dismissed.

By THE COURT:

Attest: ROBERT E. CRISWELL,
Deputy Clerk.

EXHIBIT D.

Order.

In the above-entitled case, judgment having been entered, the Court determines that there is no just reason for delay and that excution on the judgment should proceed.

HAROLD K. WOOD, *J.*

December 6, 1966.

EXHIBIT E.

Notice of Appeal to Court of Appeals Under Rule 73(b).

NOTICE is hereby given that Eastern Air Lines, Inc., one of the defendants above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on November 28, 1966.

RAWLE & HENDERSON,
By: J. GRANT MCCABE, III,
1900 Packard Building,
Philadelphia, Pennsylvania 19102,
Attorneys for Defendant,
Eastern Air Lines, Inc.

Date: December 7, 1966.

APPENDIX E.

Stipulation to Amend the Agreed Statement of the Case Pursuant to Rule 76.

I. *Introductory Statement.*

At the request of the United States Court of Appeals for the Third Circuit, the parties to the above-captioned appeal, subject to the approval of the Court below, submit this Stipulation.

This Stipulation is made for the purpose of this appeal only and shall not constitute an admission or be binding in any of the related cases pending in this Court, the United States District Court for the Eastern District of Pennsylvania or elsewhere.

II. *Stipulation.*

Subject to the approval of the Court below, the parties hereto hereby stipulate that the agreed Statement of the Case Pursuant to Rule 76, previously filed, is hereby amended to include in the record on appeal the Trial Court's charge on liability, which charge was given on November 16, 1967, and appears at pages 4165 to 4194 of the notes of testimony, and that the Agreed Statement of the Case Pursuant to Rule 76, as thus amended, shall constitute the record on this appeal.

A copy of said charge is attached to this Stipulation and made a part hereof.

RAWLE & HENDERSON,
By /s/ J. GRANT MCCABE, III,
1900 Packard Building,
Philadelphia, Pennsylvania,
Attorneys for Defendant Eastern Air Lines, Inc.

Of Counsel:
MORGAN, LEWIS & BOCKIUS

/s/ JOHN R. MCCONNELL,
John R. McConnell,
2107 Fidelity Building,
Philadelphia, Pennsylvania,
Attorney for Plaintiff.

The foregoing is approved by the United States District Court for the Eastern District of Pennsylvania.

/s/ HAROLD K. WOOD,
U. S. D. J.

[4165]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD H. RAPP, ADMINISTRATOR OF THE ESTATE OF RICHARD F. ZELLER, DECEASED, ET AL.

v.

EASTERN AIR LINES, INC., AND LOCKHEED AIRCRAFT CO., AND THE UNITED STATES OF AMERICA

CIVIL ACTION
Nos. 30078
30079
30284
30346

Philadelphia, Pa., November 16, 1966

Charge of the Court.

WOOD, *J.*

Well, members of the jury, we have reached the conclusion in one respect. Before I give you my charge, I want to reemphasize what counsel have already said. They are grateful and the Court is grateful for your patience and the concentration which you have given to this case. I have watched you throughout the trial, and we are most appreciative of it.

Before I start my charge, I do want to make this one comment to you. It may seem to some of you that it is

[4166]

rather unusual that this case would have reached you six years after the accident. Whatever deliberations you have, or whatever decision you make, that should have no bearing whatsoever. Those are things which I could explain to you but it wouldn't help you in your verdict. So don't be concerned by the fact that when you started on this case it was six years after the accident. Completely obliterate that from your minds.

I am going to read this charge to you, and I will try to read it slowly. I am sure you will listen carefully. Obviously it is a very complicated and difficult matter, but if you will be kind enough to listen to what I say, I think you will come to a just and fair verdict.

Members of the jury, this action was brought by Howard H. Rapp, Administrator of the Estate of Richard F. Zeller, Nancy A. Frankenfield, Administratrix of the Estate of George B. Frankenfield, Jr., Donald A. Scott, Administrator of the Estate of Thomas L. Moody, and Dudley A. Ward, in his own right. These are the plaintiffs in these cases. The defendants are Eastern Air Lines, Incorporated, Lockheed Aircraft Company, and the United States of America.

As I told you when you were convened, the only issue before you is that of liability, which I will explain more in detail later. However, at this time I must advise you that insofar as any liability on the part of the Government—

[4167]

that is to say The United States of America—is concerned, that is my responsibility, but that does not mean that you must disregard any evidence heard in the case insofar as evidence for or against the Government is concerned.

Members of the jury, the basic problem before you, as I repeat, is liability only. Liability can only be determined insofar as negligence is concerned. In other words, as my charge progresses I will define negligence to you and other pertinent factors, but your decision must be limited to that question. This action is based on the issue that the plaintiffs claim they are entitled to damages because of the acts of the defendants which they claim constitute negligence and proximate cause.

Before we go into the issues, it is my duty to explain to you what the duty of a jury in a case such as this requires.

I don't know whether any of you have ever served on a jury. Perhaps you haven't, perhaps you have, but I am going to try to tell you what your duty is.

First of all, you must collectively recall all of the evidence presented, whether from the witness stand or by documentary proof or exhibits. Perhaps I will refer to this again, but I wish to impress on you that any referral to evidence on my part—and I doubt that there will be very much—

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is of no effect if it disagrees with your recollection of the evidence. Also, whatever reference counsel has made to the evidence is not binding upon you. You must rely on your recollection alone. That is extremely important.

Now, members of the jury, the credibility of witnesses is an important factor. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. Ordinarily, ladies and gentlemen, it is assumed that a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the manner in which he gives his testimony, and it may influence you one way or the other.

You should carefully scrutinize all the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony

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of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider—and I mean in your deliberations later—always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

In other words, members of the jury, use your own collective good judgment as to what witness, what evidence or what is involved, which is more credible.

Now after making your own judgment, you will give the testimony, the credibility, whatever weight you think it deserves.

During the trial of this particular case certain testimony has been read to you by way of deposition. Incidentally, counsel and I have explained to you what depositions are. The testimony of a witness who, for some reason, cannot be present to testify—and that is usually the

case, and was here, that these witnesses for some reason or other were not available, so counsel with the Court's approval used their depositions—such testimony is entitled to the same considera-

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tion and, insofar as possible, is to be judged as to credibility and weighed, and otherwise considered, in the same manner as though the person were here in person. I am sure you all understand that.

In other words, it is just as though the witness were here before you and you have to consider that testimony given under oath just as though the person appeared.

Now, members of the jury, you must understand, and I do not wish to be repetitious, but it is your solemn duty to determine the facts in this case. That is why we have juries. I am sure we are all grateful for that. On the other hand, it is my duty to state to you what the law is, and you must accept my judgment on that. To put it more simply, you determine what actually happened and then apply to those facts the law as I will explain it to you.

Now, in reaching a final verdict in this case, I want to explain to you the legal effect of expert witnesses, which is a very important factor in this case, incidentally.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become experts in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they

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profess to be expert, and may also state their reasons for

their opinion. That has happened rather frequently in this case.

You should consider each expert opinion received in evidence—and, by the way, when the Court qualifies an expert witness as an expert it has no bearing on his ultimate testimony. That is for you to decide. The only thing the Court does is say that he is qualified in a particular field.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely.

Now, members of the jury, I am sure you are aware of it, but of course your verdict must be unanimous, and the verdict which you will render will be in answer to a question from the Clerk as follows: "In these four cases, on the question of liability"—keep that in mind, members of the jury; on the question of liability—"do you find that Eastern Air Lines, Inc. was liable?" To which you will answer "Yes" or "No." You will also be asked whether in the instant case Lockheed Aircraft Company was liable, to which you will answer "Yes" or "No." Your deliberations may not go beyond that point.

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Now for some further principles of law.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence, you should find in favor of the defendants.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in this case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be provided is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may, unless otherwise instructed—and you have not been so instructed—consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. That means that in your deliberations as to the facts you can consider anything in the case, whether the plaintiff brought it in or the defendant brought it in.

As I have stated, members of the jury, these

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cases must be decided only on the evidence which has been presented to you. The opening statements of counsel are not evidence, but must be given consideration. Our system of judicial procedure provides for opening statements to serve a purpose which gives you some idea of what may develop as the trial progresses. That is important in this case because it is a long drawn out case, but if something is said in an opening statement which is not substantiated by later evidence, you should disregard it, but on the other hand, you should carefully consider what counsel tells you they intend to prove during the course of this rather lengthy trial.

The same rules apply to the summations of counsel. Careful consideration should be given to them, but in the event that in the summations reference has been made to

evidence with which you do not agree, then your judgment must prevail.

These are general and accepted rules of law which you must apply to the facts.

Now we will go into some of the legal principles involved. First of all we will go to negligence. I think counsel has mentioned this to you, but I will repeat it again.

Members of the jury, negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person

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would do, when prompted by considerations which ordinarily regulate the conduct of human affairs.

That is rather wordy, but I am sure you will get the point of it. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property.

Now, the law says that ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in this case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence.

Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows, members of the jury, that the amount of caution required in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence. To put it another way, as the danger should reason-

ably be foreseen increases, so the amount of care required by the law increases.

The mere fact that an accident happened, standing

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alone, does not permit the jury to draw the inference that the accident was caused by anyone's negligence.

In order to prove the essential elements of plaintiff's claim, the burden is on the plaintiff to establish, by a preponderance of the evidence in the case, the following facts: First, that the defendant was negligent in one or more of the particulars alleged; and second, that the defendant's negligence was a proximate cause of some injury and consequent damage sustained by these plaintiffs or their representatives.

Now I have told you what negligence consists of. Negligence, in addition, must be the proximate cause of the accident. I will say here we have representatives of three persons that allegedly died in this accident and one survivor, so you must apply those principles to that. As I have said, the negligence must be the proximate cause of the accident.

Now the law says this: An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Conduct is negligent only if the harmful consequences thereof could reasonably have been foreseen or pre-

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vented. Liability, with which you are only concerned at this moment, depends upon antecedent probability, not the

mere possibility, of harmful results therefrom. The general test of liability is whether the injury could be foreseen by an ordinarily intelligent man as the natural and probable outcome of the act complained of.

Members of the jury, however, if the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.

An actor—when we use the word "actor" it means in this case the defendant—an actor should recognize that his conduct involves a risk of causing an invasion of another's interest if he possesses such knowledge of pertinent matters and surrounding circumstances that a reasonable man acting on such knowledge would infer that his acts create an appreciable chance of causing injury to another.

A normal human being, members of the jury, is held to foresee those injuries which are the consequences of his act of omission or commission which he, as a reasonable human being, should have foreseen.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only

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one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, applying these principles here, in such a case each may be a proximate cause.

Each of two persons who is independently guilty of tortious conduct—in this sense "tortious" means negligent conduct, which I am sure you are aware of—each of two

persons who is independently guilty of tortious conduct which is a substantial factor in causing a harm to another is liable for the entire harm, in the absence of any superseding cause. In other words, for either defendant to be liable, you are not required to find that one of the defendant's negligence, if such there was, was the sole cause of the accident. A wrongful or negligent act may be the legal cause of an accident even though other causes have joined in producing the final result.

It would be enough if you were to find that the defendant's negligence was a substantial factor in bringing about the accident. That is, if you find that a defendant, either of them, was guilty of negligence which was either the sole cause or a substantial factor in causing the accident, that defendant would be liable. The circumstance that some other factor may have been a contributing cause with the

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negligence of such defendant would not relieve him of responsibility, unless it has been shown to your satisfaction that the accident would have occurred even though the defendant's negligence had not been present.

In other words, if the accident—and we are talking, of course, about this particular case—if the accident would have occurred in any event regardless whether that defendant was negligent, then he could not be held responsible. Furthermore, even though there were such other contributing factors brought about by some other existing conditions, if the defendant's negligence was a substantial factor in producing injury, he would be liable.

In view of the testimony in this case that other causes may have intervened to produce the plaintiff's damages, it is necessary that there be some elaboration of the question of proximate cause as that term has been previously explained to you.

Members of the jury, any number of causes and effects may intervene between an initial wrongful act and the final injuries, and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. The initial act of negligence—assuming there was—on the part

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of the defendant cannot fix him with responsibility if his act did nothing more than furnish the condition or give rise to the occasion by which injury was made possible if there intervened between his initial act of negligence and the injury a distinct, successive, unrelated and efficient cause of the injury.

The problem boils down to this: In this regard, and this is only part of it, if the defendant committed a negligent act which did no more than set the stage for what subsequently occurred, and if the negligence of others then intervened and was the distinct, unrelated and efficient cause of the plaintiff's hurt, the defendant cannot be held liable.

Of course you must realize here we have two defendants, and we have a third defendant which I will pass upon. Now on the other hand, members of the jury, if the defendant, or either of them, committed an act of negligence which set the stage for what happened later, and at that time he could, by the exercise of reasonable diligence, have foreseen that other persons would negligently become involved in the situation which his original negligence created, the acts of third persons, intervening and contributing to the condition necessary to the injurious effect of defendant's original negligent act would not excuse that

defendant. In such a case his negligence would remain as the culpable, direct cause of the plaintiff's injury.

A critical element which distinguishes a super-

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seding cause from a concurring cause is whether the act is so extraordinary as not to have been reasonably foreseeable. Whether the act was reasonably foreseeable is to be determined by following backward the sequence of events and looking back from the harm to the negligent act rather than by considering whether the defendant or defendants should prospectively have envisioned the events which unfolded and caused the accident.

Furthermore, members of the jury, both may be liable for the entire injury regardless of the relative blame or fault of each.

Now there is a point here that I am going to bring out. I am sure you will consider it carefully. I am certain you will consider all the others, although they probably sound pretty complicated to you, but I have tried to simplify them as much as I can.

Members of the jury, a manufacturer of a chattel—the chattel in this case would be this airplane—made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Now to go on, while a commercial carrier by air is not an insurer of the passenger's safety, I instruct you

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that under the law applicable to this case there was upon

Eastern Air Lines a high duty of care in the conduct of its business. If you find that Eastern Air Lines failed to use a high degree of care for the safety of its passengers in selecting this plane, in the manner in which it used this plane at Logan Airport, or in its maintenance of this plane, and if you find that any such failure was the proximate cause of the accident, then it is your duty to give your verdict for plaintiffs and against Eastern Air Lines.

A common carrier is always under a duty to exercise a high degree of care to discover conditions which are dangerous to passengers. If the defendant's servants or employees knew of the condition, or should have known of it in view of the surrounding circumstances and in the exercise of reasonable care failed to remove or correct any problem which might give rise to this accident, and that failure was a proximate cause of the accident, then you could feel justified, you could find against Eastern Air Lines.

The defendants Eastern and Lockheed are corporations, and of course a corporation can act only through its officers and employees. A corporation is liable for the negligence of any of its officers or employees, and if you find that any negligence on the part of any Eastern Air Lines' officers or employees was the proximate cause of the happening of this

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accident, then you should find that Eastern Air Lines is liable to plaintiffs and give your verdict to plaintiffs and against Eastern Air Lines.

In other words, members of the jury, to boil that down, it simply means that any corporation—I am sure some of you gentlemen are associated with corporations—any corporation is responsible for the acts or omissions of its agents, employees, or anyone acting on their behalf.

If you should so find—I don't think it is an important factor in this case; I am not going to comment on it, but I will just leave that thought with you, that a corporation necessarily acts through its officers, agents, employees, and so forth.

Now, gentlemen, did we agree about this Aviation Act? I think it was to be read. I am quite sure of that.

Members of the jury, there have been several references here to the Federal Aviation Act. I am going to read them to you and in your deliberations you can relate those acts to any part of the case you think is worthy of it, but since it has been referred to and since counsel wants me to read them to you, I shall do so.

Members of the jury, the Federal Aviation Act of 1958 —you will recall that this accident happened in 1960—is an Act of Congress which states that its purpose, in part,

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is:

> "... to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety and to provide for the safe and efficient use of the air space by both civil and military aircraft ..."

Section 101(3) of the Federal Aviation Act of 1958 defines an "air carrier" as follows:

> "'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: ..."

Section 601(a) of the Federal Aviation Act of 1958 gives the Administrator of the Federal Aviation Agency powers and duties which include the following:

"The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

"(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

"(2) Such minimum standards governing appliances

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as may be required in the interest of safety;

"(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce."

Section 603(c) of the same act reads as follows:

"The registered owner of any aircraft may file with the Administrator an application for an airworthiness certificate for such aircraft. If the Administrator finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Administrator may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations, as are required in the interest of safety."

Now I am sorry this is taking so long, members of the jury. I can't cut it down, so please be patient and continue to listen.

In considering whether Lockheed was negligent in designing and selling this plane with the kind of air inlet it had, and in considering whether Eastern was negligent in using

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a plane of this design, you may consider the fact that the Federal Aviation Agency issued a certificate of airworthiness for this plane. But that is only a fact for you to consider. It is not binding on you and if you find from other evidence that Lockheed was negligent in designing the air inlet on this plane and in selling a plane which you find was negligently protected against the consequences of bird ingestion on takeoff and that that negligence was the proximate cause of the accident, then you should give your verdict for the plaintiffs and against the defendant or defendants you find negligent, either or both.

The regulations which I have just read to you, the regulations of the Federal Aviation Agency, may be considered in judging whether any of the parties have used due care in the performance of their duties. They are not conclusive; your decision should not rest on that. That you can consider as some evidence that they used due care, but it is not conclusive, and you give it whatever weight you think it deserves. Your decision should not be based on the regulations alone, although it is some evidence, but it is not conclusive.

Now, members of the jury, I think by now you understand what I am trying to get across to you, really, that in this case or any other case we have to rely on the good sense and judgment of jurors. You are not to reach your

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verdict in any way upon the basis of speculation or conjecture. Your verdict must be based upon credible evidence

logically considered. You may, of course, draw inferences based upon credible evidence and based upon your own knowledge and experience, but the conclusions which you reach must be reasoned conclusions without resort to sympathy, prejudice or guesswork. When a party, each plaintiff in these cases, who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such circumstantial evidence, in order to be acceptable by you, must be adequate to establish the conclusion sought and so preponderate in favor of that conclusion as to outweigh in your minds any other evidence and reasonable inferences therefrom which are inconsistent therewith.

Now, in more simple language that means that there is a great deal of circumstantial evidence, many facts were completely omitted, but you as members of the jury have the right, not only the right, but the duty to draw inferences from those circumstantial facts, so to speak.

Now, members of the jury, what are the issues in this case? I have spent all this time telling you what the law is. Now we will get down to brass tacks, so to speak.

The plaintiffs argue that Eastern Air Lines used this plane which they knew could ingest birds; that Eastern was aware of the presence of birds at Logan Airport; that they

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should have taken precautions to avoid the ultimate crash of the plans; that they were responsible for the auto-feathering device to be armed;——

You will recall there was a conflict of testimony there. There is some testimony that it armed automatically and there is also testimony that when the plane was recovered in the Bay the manual auto-feather, or I don't know the exact word for it, but in any event the manual thing was on. There is also evidence that it went on automatically. That is something you will have to decide.

—that Eastern was negligent in improperly maintaining and repairing the seat of the pilot whom they allege was operating the plane immediately prior to the accident.

Relating these allegations to the legal principles which I have given to you, should you find that Eastern, solely based on the evidence, was negligent in regard to any one of these factors, then your verdict should be in favor of the plaintiff. You have been told what constitutes negligence and proximate cause, and in order to find Eastern liable you would necessarily have to conclude first that they were negligent, and secondly, that that negligence was the proximate cause of the accident, and furthermore, that it was foreseeable.

In regard to forseeability, you will have to consider the evidence regarding the condition of the airport and

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the testimony as to the presence of birds, and things of that kind.

Furthermore, as I have explained to you, that there was no superseding cause involved which would relieve them of liability under the principles of law which I have previously stated. That goes back to what I said about superseding cause and foreseeability.

In other words, if you find that these facts are substantiated by the evidence, then you may find that Eastern was negligent and that their negligence was the proximate cause of this accident. If you do not find that these facts were proven by the fair preponderance of the evidence, then you should find in favor of defendant Eastern.

As to the issue concerning the slippage of the seat, that is purely a factual question which you must determine from the evidence. You should take into consideration all of the evidence regarding that problem and determine whether or

not there was a slippage of the seat and if so, whether it was a proximate cause of this accident. This again is repetitious, but it is important, it is very important in this case, and you must find from all the evidence precisely what happened.

If you find, members of the jury, that this seat was negligently maintained and that the wire which has been re-

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ferred to here—and it is in evidence—was a proximate cause of the accident, then you could find that Eastern was negligent and that that negligence proximately caused this accident. However, that decision would be determined by your conclusions as to the facts in the case, involving, as I have said before, all those principles of law.

In other words, members of the jury, that is something completely within your power. You will have to determine what happened from the evidence and from the exhibits, and so forth. If you come to the conclusion that the installation of that wire was negligent, or the maintenance of the seat prior to that time and up to the time of the accident, if you find that was negligent, as I have described it to you, then you may find in favor of the plaintiff.

Now, members of the jury, finally, Lockheed defends on the basis that with all the knowledge available when this plane was designed in 1958 and sold to Eastern, that they exhausted every bit of information available, and they further argue that the plane was certificated by the Government and that there was nothing they could do to improve the design or to change the design to prevent the ultimate ingestion of birds and the subsequent accident.

They further argue, and properly so, that the maintenance of the seat and the alleged question of birds in the

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vicinity of the airport were causes which were beyond their control and solely the responsibility of Eastern. The problem before you will be to apply the legal principles as to superseding cause, which I have previously related. In other words—and please bear with me; I know you are getting tired, but I will finish this as quickly as possible—the problem before you will be to apply the legal principles as to superseding cause, which I have previously related. In other words, should you find that Lockheed was negligent in designing the plane in the manner in which it did, and the negligence of Eastern in operating the plane superseded—we are back to that word again—superseded the negligence of Lockheed to an extent where Lockheed could not have reasonably foreseen the ultimate result. As I have said, was the act so extraordinary that Lockheed could not have reasonably foreseen the results of the design of the plane?

Now in layman's language that means this: Should Lockheed have been able to reasonably determine when they manufactured this plane that something like this would happen? Now, as I have told you, I am not going to go over the evidence. You can recall as well as I. You heard the arguments of counsel yesterday. Should they have reasonably determined that this could happen or was what happened so extraordinary that they should not have been expected to foresee what in fact

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happened, which no one denies.

Now there has been some talk about the auto-feathering system. I want to point out to you if in your deliberations the auto-feather system becomes a serious issue, you will not consider that insofar as Lockheed is concerned.

There has been a great deal of argument, a great deal of testimony, about the auto-feathering system and so forth, but whatever conclusions you may come to in any regard, if it relates to the auto-feathering system, that relates only to Eastern and not to Lockheed.

Now, members of the jury, finally we will go to the issue between the plaintiff and Lockheed. The plaintiff argues to you, and as presented in the testimony in support of his position, that this plane was not safely designed; that Lockheed knew or should have known of the possibility of the ingestion of birds into the plane which would result in a loss of power in the engines. The plaintiff argues to you that Lockheed sold this plane after research which could have disclosed the possibility of bird ingestion or failed to make sufficient research which would have disclosed this possibility.

Again, applying the legal principles which I have previously given to you, if you should conclude from all the evidence that Lockheed was negligent in the design of this plane, then you could find in favor of the plaintiff and against

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Lockheed.

Now, as to the position of the defendants, Eastern states and argues that this accident occurred by a unique congestion of things that had never before happened in the history of aviation. They further argue that the accident did not result from anything concerned with the seat in the airplane but was solely caused by the ingestion of birds, and they further argue that the auto-feathering system was a safe device.

As to these defenses, members of the jury, you will of course apply the same principles of law. You will have to conclude from the evidence if you find that such an acci-

dent never happened before, whether that relieves Eastern from liability based upon the legal principles which have been recited.

In conclusion, members of the jury, I am sorry you have been kept so long; I guess I have been saying that to you for about six weeks now, but you will be sworn in in a few moments by the Marshal. He will take you to lunch and then you will come back and finish your deliberations. If you have any questions, it must be in writing, it must be submitted by your Foreman.

You have been so patient so far. I hope you will continue to be patient and that you will reach a just and fair verdict in this case. As I say again, the only problem before

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you is one of liability.

I guess we have covered everything.

Mr. McConnell: Yes, Your Honor. Thank you.

The Court: All right.

Oh, by the way, the alternates will go to lunch and then when the jury starts its deliberations you will come down to my chambers. I will tell you what to do from there on.

Mr. Wickenhaver: Do you wish to excuse the alternates at this time?

The Court: Oh, no, not until they start deliberating.

Mr. McConnell: Did Your Honor wish us to approach the Bench?

The Court: No.

(Discussion off the record.)

(The Marshal was duly sworn.)

Mr. McCabe: Judge, may I ask one thing, just to be absolutely certain? Am I correct in assuming that it is not necessary for us to reassert at this time those exceptions that have already been discussed?

The Court: No, they are all in the record. The record is perfectly clear.

(The jury retired at 12:24 o'clock P. M.)

(All exhibits with the exception of P-251, 252,

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253, DE-110, 111, 129, 130, 138, 139, 140, US-1 and Court Exhibit 1 were sent out with the jury.)